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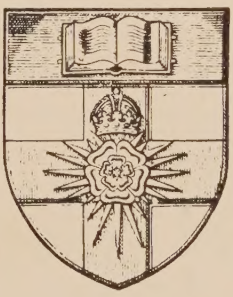

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THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

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The Right Hon. Hugh Holmes.

The Right Hon. Richard R. Cherry.

King's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.

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The Right Hon. John George Gibson.

The Right Hon. D. H. Madden.

The Hon. Walter Boyd.

The Right Hon. William Kenny.

The Hon. George Wright.

The Right Hon. W. H. Dodd.

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CORRIGENDA.

Page 35, last line of catch-words, *for* "13 & 14 Vict.", *read* "14 & 15 Vict."

,, 261, line 2 from foot, *for* "Wilkins's", *read* "Wilkinson's".

,, 262, line 11, *for* "C. J.", *read* "L. J."

,, ,, line 14 from foot, *for* "Wilkins's", *read* "Wilkinson's".

,, ,, note (4), *for* "14 Q. B. D.", *read* "2 Q. B. D. 254; 3 Q. B. D. 134".

,, 263, note (2), *for* "47", *read* "97".

,, 348, line 12, *for* "King's", *read* "Queen's".

,, 383, last line, *transpose* "of" and "or".

,, 454, line 15 of head-note, *for* "sect. 39", *read* "sect. 69".

MEMORANDA.

In the Trinity Sittings, 1913, MR. JUSTICE WRIGHT died.

In the same Sittings the RIGHT HON. THOMAS FRANCIS MOLONY, His Majesty's Attorney-General, was appointed a Judge of the King's Bench Division.

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1913.

TAYLOR *v.* THE YORKSHIRE INSURANCE COMPANY, LIMITED (1).

K. B. Div. 1911. Nov. 6, 7, 8. 1912. Jan. 17.

(1910. No. 13929.)

Insurance—Live-stock policy—Proposal basis of contract—Non-disclosure in proposal of facts known to proposer and material to the risk—Knowledge of material facts, not disclosed, acquired by agent of insuring company prior to the existence of his agency with the company—Principal and agent—Liability of principal in respect of antecedently acquired knowledge of agent—Condition in proposal that insured had not "withheld important information"—Interpretation of contract—Immaterial finding of jury.

Every act of an agent within the scope of his employment is the act of his principal; and, consequently, all knowledge acquired by the agent, when acting within the scope of his authority, is the knowledge of his principal; but knowledge acquired by the agent antecedently to his becoming agent to the principal ought not to be imputed to the latter, and the recollection or forgetfulness of the agent of matters known to him previous to that relation ought not to affect the liability of the principal, except in cases where the

(1) Before PALLES, C.B., GIBSON, and BOYD, JJ.

K. B. Div. 1911.

TAYLOR *v.* YORKSHIRE INSURANCE CO.

principal purchases the previously obtained knowledge of the agent in relation to a particular subject-matter; or where, from his position and relationship to the principal, the agent is the agent of his principal "to know or to inquire."

Dresser v. *Norwood*, 17 C.B. (N. S.), 466, distinguished.

S., a station-master at a provincial town, acted as local agent for several Insurance Companies. In 1907 the plaintiff insured with one of these companies, the A. and N., through S. as that company's agent, a stallion horse, valuable for stud-purposes, but suffering from an incurable malformation of the forelegs. In February, 1908, the A. and N. Company refused to re-insure the stallion, and that refusal was communicated to the plaintiff and to S. who at that time had not become agent for the defendant company. In 1909, S. having become agent of the defendant company, the plaintiff agreed to insure the stallion with that company through S., and a proposal for that insurance was signed by the plaintiff in October, 1909. The proposal contained several questions to be answered by the proposer, and at the foot a declaration by the proposer that he warranted the truth of the statements therein declared, that he had not "withheld any important information," and agreed that the declaration and proposal should be the basis of his contract with the company. The answers in the proposal form were filled in by S., acting, to that extent, as agent for the plaintiff; and to portion of one of the questions, *i.e.* "Have you had a proposal for live-stock insurance declined?" no answer was given. The policy was issued by the defendants; and on the death of the stallion, the plaintiff sued the defendants for the sum for which the stallion had been insured. The defence relied on was breach of condition in the contract of insurance by reason of (*inter alia*) the non-disclosure of a refusal for live-stock insurance, and, in reply, the plaintiff pleaded knowledge of the refusal by the defendants at the time the policy was effected, and waiver of the breach. At the trial the jury found that the physical condition of the stallion and also the previous refusal for his insurance were "important," but disagreed on the question whether important information had been "withheld." The learned Judge, treating the disagreement as immaterial, entered a verdict for the defendants. Upon a motion for a new trial:—*Held*, that the knowledge of the refusal to reinsure the stallion having been acquired by S. previous to becoming the agent of the defendants could not be imputed to them, and that, the jury having found that the refusal was "important," the learned Judge rightly treated the disagreement as to the withholding of important information as immaterial, that being a question of interpretation of the contract between the parties, and that the verdict entered should stand.

MOTION on behalf of the plaintiffs to set aside the judgment entered for the defendants at the trial, or for a new trial of the action.

The plaintiff claimed the sum of £1000 due on foot of a policy of insurance of the 9th November, 1909, entered into by the defendants on the life of a stallion horse called "General Symons," the property of the plaintiff, which died on the 27th October, 1910. The defendants, by their defence, relied on concealment of material facts, *i.e.*, of the horse's physical condition, and a previous refusal to insure the horse, and a breach of condition in the contract by the withholding of these material facts by the plaintiff. There was also a charge of fraud which was withdrawn at the trial. The plaintiff replied that, prior to and at the time when the policy sued on was effected, the defendants knew of the physical condition of the horse, and also of the refusal for insurance, and that the defendants had waived the condition in the contract and compliance therewith by the plaintiff. The action was tried before Dodd, J., and a special jury of the city of Dublin.

The following are the material portions of the evidence reported by Mr. Justice Dodd :—

Henry Ballisty, V.S. (examined for the plaintiff)—"I knew 'General Symons' . . . I examined him for Coyle & Co. in 1908. On the 3rd November, 1909, Scollen sent for me and asked me to examine the horse. He said, 'I know all about his feet. The company know all about that. They have decided to take him notwithstanding his legs if he is otherwise sound.' He then said, 'Well, fill up this form.' I filled it up. Mr. Taylor was not present."

Cross-examined by Serjeant Moriarty, K.C.—"In my opinion, except his forelegs, he was in perfect health. In my opinion, the fact about the horse's legs being abnormal was one that, as a professional man, I would have thought it material that the company should have been informed of. [To the Judge—] Mr. Scollen, the agent of the company, paid me for the certificate of the horse for insurance."

John Henry Taylor, the plaintiff.

"In 1899 I got a present of the horse . . . In 1904–1905 he was insured with the Scottish Live Stock Company, Mr. Scollen being its agent . . . In 1906–1907 he was insured with the Army and Navy Insurance Company (Mr. Scollen, agent), examined by

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Mr. Purcell, and re-insured 1908-1909, examined again by Mr. Purcell. The horse was refused in 1908. He was insured with Coyle & Co. I got no notice to renew . . . All the time Coyle & Co. had him Scollen wanted him back. He said, 'The date is up. Will you come back to me?' I said, 'No.' I said I would be my own insurer . . . Mr. Scollen pressed me to give him the insurance. 'All right,' I said, 'I'll do it.' I went into his office. He said, 'All you have to do is to sign this.' All but my signature is in Scollen's handwriting. I paid £50 premium."

Cross-examined. Question—"Did Mr. Scollen ever see this horse?" Answer—"Not that I know of." Question—"Did Mr. Scollen read out—'Are they or have they been insured elsewhere?'" Answer—"He did not. It is an important thing to have it taken down if a policy has been refused. Coyle never refused. The Army and Navy refused me. That was before I had been insured with Coyle. Coyle had not sent a renewal." Question—"Were not these circumstances material for the company to know?" Answer—"If I had read the declaration, I would have filled the form differently. Mr. Scollen filled it up. I did not read the answers. I told Scollen all I knew . . . I never asked Coyle why they did not renew. In the beginning of 1908 Mr. Brindley wrote to me asking if it was true that the Army and Navy had refused insurance, and on what grounds. I wrote that it was true, and that it was from some private information they had received, according to what Mr. Scollen told me. It was after that the National insured." Question—"Why did you not tell this to the company?" Answer—"I was not dealing with the company direct, but with Scollen, and he had this form filled for me. If I had been allowed to fill the form myself, I would undoubtedly have filled it differently, and given all the information in my power . . . I told Mr. Porter that Scollen knew all about the horse probably . . . I would have told them that the horse had been refused by the Army and Navy Company. I would have thought that an important matter. I knew they (the Army and Navy) had refused it from private information as to the health of the horse. They (the company) could have referred to them for the information.

Edward Joseph Hope, examined for the plaintiff, "I was

acquainted with the horse . . . It was Scollen filled up the proposal. He put no questions about General Symons." Question—"Have you had any conversation about the horse with Scollen?" Answer—"He said, 'If the old horse is a cripple, his progeny are not crippled.' He said it before July, 1909, and after July, 1909. I often heard Scollen ask Taylor to insure the horse. He (Taylor) said he was going to become his own insurance agent. I heard that more than once."

Cross-examined—"I did not hear that an insurance had been declined by the Army and Navy, and that the Live Stock had refused to renew."

[Other witnesses were examined for the plaintiff. The evidence as appearing in the learned Judge's note is not material to this report.]

Plaintiff closed. Mr. Chambers, K.C., asked for a direction upon the ground that admittedly on the plaintiff's own evidence important information was withheld from the defendant company —(1) that the Army and Navy had refused; (2) that the Live Stock had declined to continue. There was no evidence that Scollen was agent of the company to fill up the form. He said the malformation of the horse's legs was also an important matter. He also asked for a direction as to a previous insurance having been declined. He asked also for a direction on the answer that the horse "was then insured"; there was a gap of nineteen days.

I thought that these were inferences of fact that were properly to be drawn by the jury: *Lindenau* v. *Westborough* (1). Serjeant Moriarty, K.C., had referred to the case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company* (2), which he read almost at full length. I said there might be a question as to whether the facts brought his case within that decision, or whether *Bigger* v. *Rock Life Assurance Company* (3) was applicable. I was disposed to wait till I heard the questions the Serjeant would formulate, and I thought I would probably, in any event, put any questions he desired. Mr. Chambers, K.C., stated the defendants' case.

(1) 9 B. & C. 586.
(2) [1892] 2 K. B. 534.
(3) [1902] 1 K. B. 516.

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Henry Chapman Porter (examined for the defendants)—"I am resident Manager of the defendant Company for twelve years. Scollen was agent a little under three years from the present time. He is agent of the General Accident Company. He represented the Army and Navy and General Accident. I knew nothing of this horse. I was not aware of any malformation. I gave no instructions to the effect stated by Ballisty. I had an interview with the plaintiff on the 11th November, 1910. I told him that material information had been withheld; that we considered there never had been an insurance, and we offered to return the premium. He wanted to know the reasons; what had been withheld. I said he had withheld about the legs. There was nothing then said about it having been rejected by another company. I did not know that then. To the best of my recollection Scollen's name was not mentioned."

Cross-examined as to the form of reply to question 3, the witness said he had the previous answers. [To a juror—] "£50 is the premium for an ordinary £1000 horse. It does not indicate a special risk."

Thomas Scollen—

"I am station-master on the Midland Railway, and agent for various Insurance Companies. I did not act for the National. I have not got the document appointing me. The document is not forthcoming. I remember the insurance of the horse with the Army and Navy. The head-office wrote declining, but did not give any reason. I had no connexion with them. I have never seen 'General Symons.' I heard a rumour that he had peculiar legs. The form (proposal) was filled up in my office. Mr. Taylor said he had decided to insure. I read out all the questions. He answered them. He told me the colour. The previous insurance was £300. I took Mr. Taylor's word for the age. He (Mr. Taylor) signed the declaration. I asked him who was acting. I gave him the usual veterinary form. There never was a question about the horse's legs to Mr. Ballisty. He (Taylor) said, 'I have dropped this policy with Coyles.' There was no reference to the horse's legs. I never issue cover-notes. I have no authority."

Cross-examined—"I am agent at Mullingar. I read out

all the questions. Mr. Hope's statement is false. Ballisty swore falsely. I knew the name of the horse, and that he had been previously insured. I did not know he was thoroughbred. I did not know he was brown. I have no recollection of saying that the horse was an old cripple. I am sure I never used such words. I absolutely did not know his legs were crippled. I heard he had bound legs. Mr. Taylor told me the horse was sound and healthy, except for those peculiar legs. He said he was insured with Coyles. I did not know Coyles' policy had lapsed. I asked him to give it to me, when renewal fell due. I knew it had lapsed or was about to lapse. He told me he would become his own insurer. I did not know Coyle, and he had declined. I forgot the fact about the Army and Navy having declined. I cannot recollect what Mr. Taylor said, as to the answer to the questions in No. 3. It was an omission on my part. Mr. Taylor knew I knew the companies he had been insured with. It was only necessary to mention the name of the last company. He suggested Ballisty. I cannot see anything false in the answers. The policy was sent to me as agent. It was issued by me as agent of the company. I forwarded the proposal; the company accepts or does not, and sends me the policy."

Re-examined—"Mr. Taylor said: 'Fill it up, Mr. Scollen, and I'll sign it.' [To a juror—] I had the knowledge about his legs. I never revealed it to the company."

Oliver Kingdom, Secretary of the Army and Navy Insurance Company—"In 1906 Mr. Scollen was our agent. I declined to re-insure in 1908. We refused to re-insure. We had prepared a new policy. We cancelled it. We wrote to Mr. Taylor, informing him, on 24th February, 1908. We wrote to Scollen, on the 21st February, 1908."

[Other witnesses were examined for the defendants, but their evidence is not material to this report.]

The learned Judge in his report then stated—

Mr. Chambers, K.C., renewed his application for a direction. Among other cases he referred to *London Assurance Company* v. *Mansel* (1).

(1) 11 Ch. D. 363.

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Serjeant Moriarty, K.C., asked me to leave the questions that I append. He reminded me that I said I would leave such questions as he proposed. I said I never contemplated such questions. What I had in my mind was a question as to whether Scollen was agent for the plaintiff in filling up the proposal form. He said he did not dispute that; he did not wish any question put as to that. I declined to put any of the questions he tendered. I submitted the questions that appear in my certificate.

I charged the jury. I told them the issue raised between the parties was one of contract, not of fraud. The declaration and the proposal were the basis of the contract. About the two matters that were challenged; *i.e.*—(*a*) the condition of the horse's legs; and (*b*) the non-disclosure of the fact that another company had refused to insure, I could not, as suggested by Serjeant Moriarty, substitute the rumour of the country or the knowledge of Scollen for the declaration of the individual applying for the insurance. Counsel for the plaintiff admitted that the plaintiff was bound by the proposal—that Scollen was his agent for the purpose of filling it up. The plaintiff adopted all that Scollen did on this part of the case. As to the first question, I said I left the whole document to them. Did it, as it stood, substantially tell the truth? There was a certain class of statement that was true, as far as it went, but that was not the truth that was required in an insurance contract. I said Scollen had said he forgot, and that was a curious thing. Did Taylor also forget? I read the plaintiff's answers to the questions put to him by Mr. Chambers. As to the information being withheld, I said, "withholding" did not imply deliberate withholding; they must read it as being "not disclosed"; and not disclosed in the proposal. I concluded by saying that, unless the information was properly given that would have been necessary to enable the company to arrive at a full appreciation of the risk they were running, there was no contract. After a considerable interval the jury returned. They said they could not agree as to No. 4. I asked had they agreed on the other questions: they said, "yes." A juror asked me did I not tell them "withheld" meant "not disclosed." I said, "yes." The jury still said they could not agree. I said I had some doubt whether there was any question

for *them*, when they had found the information was "important." I withdrew the question for them, and on the other questions entered a verdict for the defendants. I stayed execution. I thought the first finding was not in accordance with my ruling, having regard to the answers to the other questions.

The following were the questions left by the learned Judge to the jury, and the answers returned by them:—

1. Were the statements in the proposal true? Answer—"Yes."

2. Was the fact that an application to another insurance company had been refused important? Answer—"Yes."

3. Was the fact of the malformation of the horse's legs important? Answer—"Yes."

4. If so, was information in respect of either, and, if so, which of these matters, withheld from the company in the proposal? Answer—"Cannot agree."

The following were the questions tendered by plaintiff's counsel:—

(1.) Was Scollen the agent of the defendants for the purpose of getting the proposal from the plaintiff and for seeing that it was correctly filled up, so far as Scollen's own knowledge of the matters referred to in the proposal extended?

(2.) Did Scollen know the condition of the horse's legs?

(3.) Did Scollen know the horse had been previously declined for insurance?

(4.) Was the said horse at the time of the said proposal and insurance in fact sound and healthy?

(5.) Was any material fact not stated in that proposal known to Scollen?

(6.) Was Scollen the agent of the defendants for the purpose of issuing the policy to the plaintiff and receiving the premium of £50?

The grounds upon which it was sought to set aside the judgment entered for the defendants, as stated in the plaintiff's notice were as follows:—Misdirection by the Judge at the trial; that the questions of fact in the action were not properly left to the jury, and that there were no sufficient findings thereon; and that evidence was improperly rejected.

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Serjeant Moriarty, K.C. (with him, *Henry, K.C.*, and *Denning*), for the plaintiff:—

The assured is not bound to disclose what is known to the insurers, even if there is an express condition: *Pimm* v. *Lewis* (1). The same position is expressed with reference to marine assurance by the Marine Insurance Act, 1906 (6 Edw. 7, c. 43), under section 18 (1), which deals with disclosure by the assured. The general rules of principal and agent apply to contracts of insurance: if the agent is authorized to accept the proposal for the company, the company is bound by his act in accepting the proposal. Estoppel applies, so that if any material matter is known to the agent which it is his duty to communicate, that knowledge of the agent is imputed to the company, and they are estopped from denying knowledge: *Wing* v. *Harvey* (2); *Splents* v. *Le Fevre* (3). *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (4) really rules this case. In *Biggar* v. *Rock Life Assurance Co.* (5) there were several false statements. If the jury in this case had found that the statements in the proposal were false, this case would be like *Biggar's Case* (5); but the jury have not so found. The case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (4), and the cases of *Hough* v. *Guardian Assurance Co.* (6) and *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (7), are authorities for the principle that, even where there is a condition avoiding the contract if material information is withheld, if the agent of the insurers contracts with a knowledge of facts withheld by the assured which would avoid the contract, the insurers are liable. The question is the state of the agent's mind as affected by knowledge of the material facts. We have to deal with actual, as distinct from constructive, notice: Halsbury's Laws of England, vol. i, p. 215.

The question is, what was Scollen's state of mind when the proposal was signed. If *Hargreaves* v. *Rothwell* (8) is good law,

(1) 2 F. & F. 778.
(2) 5 De G. M. & Gor. 265.
(3) 11 L. T. (N. S.) 114.
(4) [1892] 2 Q. B. 534.
(5) [1902] 1 K. B. 516.
(6) 18 T. L. R. 273.
(7) 23 T. L. R. 521.
(8) 1 Keen, 154.

it applies to this case; here there was knowledge of the material facts by the agent, known to him in connexion with the insurance of the horse through himself with another company. Scollen's duty was plainly to see that correct answers were given to the questions, wherever he acquired the knowledge he had of the facts unanswered: *Re Fenwick, Stobart & Co., Limited* (1); *Blackburn* v. *Vigors* (2).

A breach of the condition can be waived by express agreement, or by conduct. We rely on the conduct of Porter, the defendant's manager. He was asked if he noticed that no answers had been given to part of question 3; he replied "Yes." And when asked why he did not ask for an answer, he replied he had the other answers in his possession. *Wing* v. *Harvey* (3) is a distinct authority in our favour, and, on the construction of clause 10 of the policy: *Armstrong* v. *Turquand* (4).

Having regard to the findings of the jury, and considering that Scollen knew of the material facts, *i.e.*, the state of the horse's legs, and the refusal for insurance, there has been really no trial of this case; and the plaintiff is entitled to a new trial.

Chambers, K.C., and *Battersby, K.C.* (with them, *Frank FitzGibbon*), for the defendants:—

Armstrong v. *Turquand* (4) does not apply. There the question was whether void meant void or voidable, and there the company had knowledge of a breach of condition and, notwithstanding that knowledge, accepted premiums. The knowledge of an agent which is to be imputed to his principal is knowledge acquired by the agent in the transaction in which he is agent, and acquired as agent. That is established by every case cited by the learned Serjeant. But here the form of the proposal removes all question of knowledge. It is admitted that Scollen acted as agent for the plaintiff in filling up the proposal. The plaintiff expressly warranted the answers in the proposal, and is in the same position as if he himself had filled in those answers.

The knowledge that Scollen had of the material facts not

(1) [1902] 1 Ch. 507.
(2) 12 A. C. 531.
(3) 5 De G. M. & G. 265.
(4) 9 I. C. L. R. 32.

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disclosed was obtained, as regards the fetlocks, in the years 1902 and 1903, and as to the refusal of the Army and Navy Company to re-insure, in 1908. On Porter's evidence, Scollen was not, when he acquired knowledge of these facts, the agent of the defendants. Scollen had no knowledge that Coyle & Company had refused to continue their insurance, and that refusal was not disclosed in the proposal. The authorities show that the cases where the agent's knowledge is attributable to his principal are those where the knowledge is acquired by the agent as agent in the particular transaction. In *Pimm* v. *Lewis* (1) the fact that the rice was chaff was in the knowledge of everyone concerned; the agent for the company there went to look at the premises at the time the proposal was made. In *Wing* v. *Harvey* (2) the agent of the company got the information in the particular transaction concerning the policy. In *Splents* v. *Le Fevre* (3) the agent and insurer came to an agreement as to the age of the person insured, and they stated that age at two years less than it actually was, and the agent and insurer both knew the person, the subject of insurance. *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (4) has been considered in the case of *Levy* v. *Scottish Employers' Insurance Co.* (5). *Bawden's Case* (4) is entirely in our favour. There it is obvious that the information came to the agent in the particular transaction, and while the agent was in discharge of his duty to the defendants. Besides, the agent in *Bawden's Case* (4) was an agent of an entirely different character. Here the agent is a station-master who is an agent for many companies; and it is not the case of an illiterate person seeking an insurance. The very object of the company in asking for answers on the proposal is to protect the company from fraud; they do not ask for information from their agent: *Re Payne* (6). The misrepresentation here was non-disclosure of material facts: *London Assurance Co.* v. *Munsel* (7); *Edgington* v. *Fitzmaurice* (8). *Dresser* v. *Norwood* (9) is not against the

(1) 2 F. & F. 778.
(2) 5 De G. M. & G. 265.
(3) 11 L. T. (N. S.) 114.
(4) [1892] 2 Q. B. 534.
(5) 17 T. L. R. 229.
(6) [1904] 2 Ch. 608.
(7) 11 Ch. D. 363.
(8) 29 Ch. D. 459.
(9) 17 C. B. (N. S.) 466.

defendants; there the agent was an agent in a commercial transaction, and it is clear that the knowledge was obtained in the course of the transaction. Here there is a warranty that nothing important has been withheld, and even if the company have knowledge they must succeed. The parties are entitled to lay down the terms of their contract; and every matter asked in the proposal is important. If the proposer abstains from answering the inquiries in the proposal, every matter which he withholds having regard to the warranty is the same as a false representation: *Ex parte Daintree* (1).

[Counsel also referred to *Cave* v. *Cave* (2); *Barnard* v. *Faber* (3); *Thomson* v. *Weems* (4); *Duckett* v. *Williams* (5); *Société Générale de Paris* v. *Tramways Union* (6); Halsbury's Laws of England, vol. i, p. 216.]

Henry, K.C., in reply:—

The jury have found that there were two important matters not disclosed, *i.e.*, the state of the legs, and the refusal of the Army and Navy Company. If the defendants choose to employ Scollen, they must take the risk of his knowledge. It was clearly Scollen's duty to tell the defendants about the previous refusal for insurance. The company are bound by the knowledge that was present to Scollen's mind when the proposal was signed: *Marjoribanks* v. *Hovenden* (7); *Nixon* v. *Hamilton* (8); *Dresser* v. *Norwood* (9). That duty brings this case within the case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (10). The broad ground of the decision in *Dresser* v. *Norwood* (9) has never been over-ruled or assailed.

PALLES, C.B.:—

1912. Jan. 17.

This is an action on a policy of assurance for £1000, effected by the defendant company with the plaintiff on the 9th November, 1909, against loss by the death from accident or disease of his stallion, "General Symons."

(1) 18 W. R. 396.
(2) 15 Ch. D. 639, 643.
(3) [1893] 1 Q. B. 340.
(4) 9 A. C. 671.
(5) 2 Cr. & M. 348.
(6) 14 Q. B. D. 424.
(7) 6 I. Eq. R. 238.
(8) 1 I. Eq. R. 46.
(9) 17 C. B. (N. S.) 466.
(10) [1892] 2 Q. B. 534.

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The policy recites that the plaintiff had caused to be delivered to the company a proposal which the insured hath agreed shall be the basis of this policy, and be considered as incorporated herein.

The proposal thus referred to, and made the basis of the policy, is signed by the plaintiff and contains six questions, which were required to be answered by the proposer. The third is: "Are they" (the animals proposed to be insured) "or have they been insured elsewhere? Have you had a proposal for L. S." (live stock) "insurance declined? Have you been paid claims? If so, how many, and by whom?"

At the foot of the proposal there is the following declaration, "It, he undersigned" (*i.e.*, the plaintiff), "do hereby warrant and declare the truth of all the above statements; that all animals are, and have been, in good health; and that *I have not withheld any important information*; and I agree that this declaration and proposal shall be the basis of the contract between me and the Yorkshire Insurance Company, Limited."

Thus, the contract sued on contains a condition that the plaintiff has not withheld any important information; and I desire to state that my judgment is based solely on this condition, and not on the 10th condition endorsed on the policy, which avoids the policy if it be *obtained through* the withholding of material facts. The consideration of this latter condition involves a question of causation which, in a case such as the present, depending, as it does, upon a strict discrimination between the functions of the Judge and the jury, is materially different from that which I proceed to discuss.

In canvassing for and procuring the proposal for this insurance, in forwarding that proposal to the company's office in Dublin, in handing to the plaintiff the policy, which was sent to him from the Dublin office, and in receiving the premium, one Scollen acted as agent for the defendants.

"General Symons," the animal insured, although a most valuable horse for stud purposes, had a serious malformation of the forelegs. The fetlocks of these legs were so much turned in that, instead of walking, he could merely hobble. There is evidence that this diminished, to a substantial degree, his power of locomotion and of taking exercise; and consequently may have

affected his power of digestion, and through it, his general health.

Prior to the policy sued on, the horse had been insured in various companies. In 1904 and 1905, he was insured with the Scottish Live Stock Company, and, in 1906 and 1907, in the Army and Navy Company. These four policies were effected through the intervention of the same Mr. Scollen, who in reference to them acted as agent of the respective insuring companies. In February, 1908, the Army and Navy Company declined to re-insure; and the fact that they so declined was known at the time to both the plaintiff and Scollen; but Scollen was not, at that time, nor until the month of June following, an agent for the defendants.

In 1908 and 1909, the horse was insured with the National Live Stock Company, for whom Coyle & Co. were agents. On the 17th of July, 1909, this company sent Mr. M'Kinney, a veterinary surgeon, to examine the horse, and, after his visit, this company did not send the plaintiff the usual notice requesting him to renew the policy.

Under these circumstances, Scollen, who had been agent of the Army and Navy Company at the time that company had declined to re-insure, and had since become agent for the defendant company, asked the plaintiff to insure the horse with the latter company, which, after some demur, the plaintiff agreed to do.

The proposal for the insurance bears date the 29th October, 1909, and is signed by the plaintiff; but the answers are in Scollen's handwriting. The plaintiff and Scollen differ as to the circumstances of the preparation of this document. The plaintiff says that Scollen filled up the answers; that he (the plaintiff) did not read them; that he told Scollen all he knew; that he was not dealing with the company direct, but with Scollen; that if he had been allowed to fill the form he would have filled it differently, and given all the information in his power. Scollen, on the other hand, swore that the plaintiff told him to fill up the form; that he read out the questions; and that the plaintiff answered them.

For the purposes of this case, I deem the difference between these two accounts immaterial; but, in the determination of

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this motion, I assume, as I am bound to do, that the plaintiff's account is the correct one. It is, to my mind, undoubted, and, indeed, was ultimately admitted by Serjeant Moriarty, that, in filling up the answers, Scollen must be taken to have acted as the plaintiff's agent, and that the plaintiff is bound by the declaration he signed, as if he had read it, and knew the answers it contained: *Biggar* v *Rock Life Assurance Comyany* (1).

As, however, during the early part of the argument, it was suggested that this decision, which was that of a single Judge—the late Mr. Justice Wright—was inconsistent with the previous decision of the Court of Appeal in *Bawden* v. *The London, Edinburgh, and Glasgow Assurance Company* (2), and must, therefore be taken not to be law, I do not like to altogether abstain from referring to this question.

In *Bawden's Case* (2) the plaintiff was an illiterate man, and, to the knowledge of the defendant's agent, was almost unable to read or write, although he could write his name. He had but one eye. Quin, the company's agent, saw this when the plaintiff applied to him to be insured. The form of the proposal was a complicated one, and contained a note: "If not strictly applicable, particulars of any deviation must be given at back"; which may well be taken to have been a direction, not to the proposer, but to the agent. Lord Esher, M.R., rested his judgment on the imputation to the company of the knowledge acquired by their agent during the negotiations for the policy, that the proposer had but one eye. Lindley and Kay, L.JJ., however, in addition to relying on this imputation of notice, held that a duty lay upon Quin, in reference to the filling up of the proposal, Lindley, L.J., stating it was his duty "to put it in shape," and Kay, L.J., that it was his duty to see that it was filled up correctly, and to have written at its back that the proposer had but one eye—a fact which rendered the form not strictly applicable. Thus, one Lord Justice expressly and certainly, and the other probably, bases the duty which it is alleged makes the company's agent an agent of the proposer to fill up the answers, on the special circumstances of that particular

(1) [1902] 1 K. B. 516. (2) [1892] 2 Q. B. 534.

case. This is the view taken of it by Wills and Phillimore, JJ., *Levy* v. *Scottish Employers' Insurance Company* (1).

Agreeing, as I do, with them, I hold not only that, as a general rule, no such duty devolves upon an insurance company's agent, but that the expressions relied on do not indicate an opinion that it does. On the contrary, I hold with Mr. Justice Wright, that, although "he may have been an agent to put the answers in form," the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form; and that, if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that extent, the agent, not of the insurance company, but of the proposer. In arriving at this conclusion, I have not overlooked the fact that both in *Biggar* v. *The Rock Company* (2) and *Levy's Case* (1) there was a provision in the proposal that verbal statements to the agent should not be imputed to the company; but, in relation to this question of authority, as distinct from that of imputations of notice, this is immaterial.

I have read, with pleasure and advantage, the judgment of Field, J., in delivering the unanimous opinion of the Supreme Court of the United States, in *New York Life Insurance Company* v. *Fletcher* (3), relied on by Mr. Justice Wright, which well repays perusal.

I revert now to the third question, which I have already read: "Are they, or have they been, insured elsewhere? Have you had a proposal for L.S. insurance declined? Have you been paid claims? If so, how many, and by whom?" The answer is, "Yes; with Coyle and Co., Dublin."

Thus, part only of that question is answered, viz., that part of the question which asks, "Are they insured elsewhere?" The answer omits to state (1) that the horse had been insured with the Army and Navy Company; (2) that that company had declined to re-insure; nor did the answer disclose (3) that the National Company, the principals of Coyle and Co., Dublin, intended not to continue their insurance. I, however, leave out

(1) 17 Times L. R. 229.
(2) [1902] 1 K. B. 516.
(3) 117 U. S. 519.

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of consideration this third matter not disclosed, as it may be that whether the plaintiff knew of this intention of the National Company involved matter of fact for the consideration of the jury. Be this, however, as it may, every other matter I have stated was undisputed, and, in fact, was the common case of both parties.

The defendants, by their defences, relied upon the physical condition of the horse and his having been previously declined for insurance, as constituting breaches of the condition, and, also upon the concealment of those matters being fraudulent. To the former the plaintiff replied, that when they effected the policy, the defendants knew of the condition of the horse, and that he had been previously declined for insurance, and that they had waived the compliance with the conditions. At the trial the defendants withdrew the charge of fraud.

The jury found that the fact of the insurance having been declined by another company was important, as was also the malformation of the legs; but, I am not to be taken as deciding that the mere fact of the questions in the proposal, making inquiry as to these matters, did not *per se* make the answers or the omission to answer material. The jury were told by the learned Judge that the meaning of the word "withheld" in the proposal was "not disclosed in that proposal," but they disregarded that direction by failing to agree on another of the questions left to them —whether the information in reference to these matters, which was, in fact, not disclosed by the answers, was withheld by the plaintiff.

Upon these findings of the jury, Mr. Justice Dodd entered a verdict for the defendants, refusing to leave to the jury questions suggested by Mr. Serjeant Moriarty as to the knowledge by Scollen of the material facts omitted from the proposal.

Mr Serjeant Moriarty, for the plaintiff, now moves for a new trial; and relies on *Armstrong* v. *Turquand* (1), as establishing that knowledge by the company, at the time of the policy, of the matters omitted from the proposal, is a good answer to a defence relying upon the breaches of the condition.

In that contention I agree with the learned Serjeant. No doubt, the questions in the two cases are not identical, the know-

(1) 9 I. C. L. R 32.

ledge of the breach of condition in *Armstrong* v. *Turquand* (1) having been acquired after, and not, as here, at the time of the policy; but the *ratio decidendi* there (as explained in the elaborate judgment of Mr. Justice Christian), that "void" in the condition should be construed as void at the election of the insurers, and that the receipt, with such knowledge, of a premium payable under the policy was an election by the insurance company to affirm the policy, seems equally applicable here.

Serjeant Moriarty's next contention was that Scollen's knowledge of the matters omitted from the proposal was, in law, the knowledge of the company. On this point *Armstrong* v. *Turquand* (1) affords us no assistance. That case was decided on demurrer, which admitted the facts stated in the replication demurred to, that *the company* (not any particular agent of the company) were made acquainted with the fraud, and that *the company*, with such knowledge, affirmed, and elected to hold, the policy.

As to this second proposition of the learned Serjeant, Mr. Chambers and Mr. Battersby insist—(1) that the nature of Scollen's authority as agent was not such that his knowledge should be imputed to the defendants; and (2) (which was the matter principally argued before us) that, at all events, the only knowledge of an agent which binds his principal is knowledge acquired whilst he was agent, and in the matter of the agency, and that Scollen's knowledge, which admittedly was acquired before the commencement of his agency, was not imputable to the defendants.

Now, having regard to the nature and object of the contract between the plaintiff and the defendants (which I shall be obliged to explain later on, in reference to another question), I entertain very serious doubts whether, even if antecedent knowledge of an agent is imputable to his principal, Scollen's knowledge in this particular case, and in relation to the particular contract here, is so imputable; but I am unwilling to base my judgment on any such consideration, in consequence of the vagueness of the evidence as to the extent of Scollen's authority. As to this neither party appears to have directed any attention at

(1) 9 I. C. L. R. 32.

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the trial. Although Scollen was admittedly the defendants' agent at Mullingar, the evidence is a blank as to his duties or as to the extent of his powers as such agent, save so far as those duties and powers can be inferred from his proved acts. To raise this question, the instrument appointing Scollen agent ought to have been proved, or some other clear evidence ought to have been given of the extent of his powers. I am unwilling that, in a case of this nature, the decision should depend upon the question of *onus* of proof, without some clearer indications being given at the trial that it was intended to raise that question. I am the stronger in this view as, on the next question raised, I entertain a clear opinion in favour of the defendants. I am, therefore, to be understood as not offering any opinion upon the first answer of the defendants' counsel to Serjeant Moriarty's second proposition.

The decision, therefore, of the case must, in my opinion, rest upon our view of two questions :—Firstly, whether the knowledge of Scollen, acquired before the commencement of his agency for the defendants, binds them as his principals; secondly, if not, can we, without any finding upon the fourth question, hold, as a matter of law, that information in respect of these matters was withheld from the company, in breach of the conditions in the proposal?

As to the first of these questions, the general principle, subject to exceptions, to which I shall advert later on, upon which knowledge of an agent is deemed the knowledge of his principal, is the familiar one of *qui facit per alium facit per se*. Every act of an agent, within the scope of his authority, is the act of the principal. Consequently, all knowledge acquired by the agent when acting within the scope of his authority, is the knowledge of the principal. In relation to the liability of the principal arising from the act of his agent, there is, in my opinion, no distinction between the act in or by which knowledge is acquired and any other act. It follows that knowledge acquired by the agent antecedently to the existence of the relation of principal and agent ought not to be imputed; and recollection or forgetfulness by the agent of matters known previous to the relation ought not to affect the liability of the principal, save in cases (of which many can be supposed, but of which this is not one) in which the principal purchases the previously obtained knowledge

of the agent in relation to a particular subject-matter, or where the agent is—to use the emphatic words of Lord Halsbury—"an agent to know" (1). That is the conclusion which I should arrive at on principle irrespective of authority. But when a question of notice, or knowledge, arises, we find ourselves overwhelmed in a sea of authorities, not altogether reconcilable with each other, many of which will be found discussed in the notes to *Le Neve* v. *Le Neve* (2) in the second volume of White and Tudor's Leading Cases. I do not propose to wander through that wilderness. I content myself by saying that, as a general rule, the notice imputed to the principal is limited to that acquired by the agent whilst he was agent, and acquired in the matter in relation to which he was agent. That was the opinion of Lord Hardwicke, in *Warrick* v. *Warrick* (3), and in *Worsley* v. *Earl of Scarborough* (4); of Lord Eldon in *Hiern* v. *Mill* (5); of Sir John Leach, in *Mountford* v. *Scott* (6); of Sir James Wigram, in *Fuller* v. *Bennett* (7), where he stated it to be a rule *positivi juris*; of Lord Cottenham, in *Wilde* v. *Gibson* (8); of Vice-Chancellor Kindersley, in *Boursot* v. *Savage* (9); and of numerous other Judges.

There were, however, and there still are, some exceptions to this rule.

First, where the same solicitor acts, in relation to title to real property, for two separate parties—say vendor and purchaser, or mortgagor and mortgagee. Cases of this class do not apply here.

Secondly, there was, until 1882, a second exception confined to conveyancing matters, which seems to have originated in a remark of Lord Eldon (10), who, when reviewing, in 1823, Sir John Leach's decision in *Mountford* v. *Scott*, said:—"I should be unwilling to go so far as to say that if an attorney had notice of a transaction in the morning he shall be held in a Court of Equity to have forgotten it in the evening," adding, "it must in all cases depend upon the circumstances." From this date until 1882 there

(1) 12 A. C. 537.
(2) Ambl. 436.
(3) 3 Atk. 294.
(4) 3 Atk. 392.
(5) 13 Vesey, 120.
(6) 3 Madd. 34.
(7) 2 Hare, 402.
(8) 1 H. L. Cases, 614, 615.
(9) L. R. 2 Eq. 134, 142.
(10) Turner & Russell, 274.

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was a bewildering line of authorities, not always uniform, in which the circumstances were considered. In that year, happily by section 3 (ii), of the Conveyancing Act, this anomaly was abolished; and, not only as to future but also as to past conveyancing transactions, including sale of personal property, the notice to an agent which is prejudicially to affect a purchaser is limited to notice "in the same transaction." The effect of this enactment seems to me to go something further than to put an end to this exception to a general rule. It amounts almost to a legislative declaration of the existence of the general rule, the exception to which, not only as to future but also to past transactions, is extinguished.

The third exception is one which requires more careful consideration. It is one to which effect was given by the Exchequer Chamber in *Dresser* v. *Norwood* (1), and is confined to commercial agents in certain particular commercial transactions, the rights and liabilities of whom are well known to the law merchant. The agent in that case was a factor, and the question in it was as to the effect on the purchaser, at a sale by him, of notice to the purchaser's agent at the sale that the goods sold were the property, not of the factor himself, but of a principal. In the action, which was one by the vendor of goods sold by a factor on a *del credere* commission, the purchaser sought to set off, against the purchase-money, a debt due to him by the factor. The purchaser had bought through an agent, who had previous knowledge, not acquired whilst he was agent to the plaintiff, that the goods were the plaintiff's. The Court of Common Pleas (Erle, C.J., Willes, J., and Keating, J.) decided that this previously acquired knowledge of the agent did not bind the defendant, and allowed the set-off. The judgments discussed the general rule as to the effect of notice to an agent upon the rights of his principal, and did not treat as an exceptional case the notice to a factor who, while being entitled to sell only as factor, held himself out as being the true owner, and, in my opinion, those judgments accurately determine that general rule.

That decision was reversed in the Exchequer Chamber. The

(1) 14 C. B. (N. S.) 574; 17 C. B. (N. S.) 466.

judgment in that Court does not discuss the reasons of any of the Judges below, or deny the soundness of the general rule applied by them, but decided that the rule was not applicable, as the sale being by a factor was within an exception to it. It commences by the following words:—

"We think that, *in a commercial transaction of this description*, where the agent of the buyer purchases, on behalf of his principal, goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal. It seems to be conceded that if, *at the time of the sale*, the factor of the seller had expressly told the agent of the buyer that the goods were not his property, but the property of his principal, it would not have been a case for a set-off; but why should the factor tell the buyer's agent that which he was aware that the agent already knew? The knowledge of the factor of the seller that the buyer's agent was aware that he was only the factor, in our judgment makes the case perfectly clear; but it is not to be understood that we mean to admit that the case would have been different if the factor was ignorant that the knowledge of the fact was present to the mind of the buyer's agent, provided it really was so present."

In my opinion, this judgment does no more than engraft on the general rule a special exception in reference to a special class of cases. A factor, although an agent only, is allowed by law to sell the goods of his principal in his own name, without distinguishing whether he sells as principal or as agent; and it is matter of common knowledge that a large part of the goods sold by factors are in fact not their own, but those of their principals. Therefore, the mere fact that a factor sells in his own name does not entitle a purchaser to set off, as against the purchase-money, a debt due to him by the factor: *Cooke* v. *Eshelby* (1). The right to set off is dependent upon the circumstances of the sale—upon the agent selling (in the words of Lord Watson) "as his own"—

(1) 12 A. C. 271.

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a circumstance which is rightly treated by Willes, J., in *Semenza* v. *Brinsley* (1) as deceit. This right to set off is, therefore, never acquired, unless there has been a false representation by the factor, which a purchaser when instructing his agent to buy has no right to expect. The mere fact that the sale is by a factor, according to the House of Lords, puts the purchaser upon inquiry as to the character in which the factor sells, "whether as principal or agent," and a principal who buys through an agent at such sale necessarily makes that agent his agent to inquire. That something of this nature underlies the *ratio decidendi* of the Exchequer Chamber is apparent from the judgment, being based on the principle that a statement of the truth *at the time of the sale* would have precluded the set-off, which is equivalent to a statement that the agent was agent to hear the statement. He was an agent employed "to know." The same principle may possibly apply to some other commercial relationships known to the law merchant; but there is nothing to justify us in holding that there is any such relationship in the present case.

The case most relied on by the plaintiff I have already referred to, viz., *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company* (2). But, in that case, the knowledge that the assured had only one eye was acquired by Quin, the agent, in the course of the negotiation for the insurance; and there are other very wide distinctions between it and the present as to which I do not wish to overlay the present case by references.

I think it unnecessary to say anything as to the other cases cited as, with the exception of those which section 3 (ii) of the Conveyancing Act, 1882, has rendered inapplicable, none lays down anything contrary to the conclusion at which I have arrived.

As to the second question, I agree with the learned Judge that material information within the knowledge of the plaintiff, not disclosed in the proposal, was "withheld," within the meaning of that word in the proposal.

One of the objects of a proposal is to lay before the insuring company such facts within the knowledge of the

(1) 18 C. B. (N. S.) 478. (2) [1892] 2 Q. B. 534.

proposer as, in the opinion of the company, are material in valuing the risk they are asked to undertake. The mode adopted by the company in attempting to obtain knowledge of these facts is, first, by asking certain specific questions and requiring a warranty that the answers given to these are true. But that alone is not sufficient. It is essential to the true valuation of the risk that, not only shall there not be any false representation, but that there shall be no concealment of any material matter. So essential is this that the very nature of the contract involves a duty in the proposer to state all material facts within his knowledge; and Sir George Jessel, in *London Assurance Company* v. *Mansel* (1), uses the words "non-disclosure" and "concealment" as synonymous in reference to matters which it is one's duty to disclose. "Concealment," properly so called, says that very learned Judge, "means non-disclosure of a fact which it is a man's duty to disclose."

Now, in my clear opinion, the effect of the words in the proposal "I have not withheld any important information," amounts to an express condition at least as extensive as that which is implied by law in a contract of insurance, that the information given is *all* the information, material to the insurance, within the knowledge of the proposer; and that, therefore, any such information not communicated is, within the meaning of the document, "withheld," just as, within the meaning of the insurance law, it is concealed.

How does the contract provide that this information is to be communicated? To answer this we must look to the nature of the document. Its object was to communicate information for the purpose of valuing the risk. The risk, undoubtedly, was to be valued at the head office of the company—whether in Dublin or London does not appear—by the officials there; not in Mullingar by Scollen. Therefore, the information to be communicated should be put in such a form that it should reach the head office. Again, the information was to be covered by a condition by the proposer in a document which was to bear his signature; and, therefore, the only mode of communication sufficient to satisfy the intention of the parties was disclosure in the proposal itself. I am therefore

(1) 11 Ch. D. 363.

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of opinion that the true meaning of "I have not withheld" in the proposal is "I have not withheld from this proposal," and that everything material which was within the plaintiff's knowledge, and which was not disclosed in the answers, was withheld; that the fourth question really involved matter of law only; and that the learned Judge rightly treated the disagreement of the jury upon it as immaterial.

For these reasons, I am of opinion that the verdict and judgment should stand, and that this application should be refused with costs.

GIBSON, J.:—

If there was any question proper to be submitted to the jury in addition to the three answered by them, there must be a new trial; and, in determining whether there was any such question, the evidence of the plaintiff and the witnesses supporting his case must be accepted as true. Before us the argument substantially turned on whether knowledge acquired by Scollen, the defendants' agent, should be imputed to the defendants, it being hardly disputed that, if it could not be so imputed, the verdict was rightly directed for the defendants. Counsel for the company contended that such knowledge was, in the circumstances of the case, not imputable; and also that Scollen's knowledge could not exonerate the plaintiff from the obligation of fully answering the questions in the proposal, and could not modify the terms of the contract.

The proposal, dated the 29th October, 1909, signed by the plaintiff, and expressly made the basis of the contract, contained two material questions, numbered 2 and 3, as follows:—(2) Are the animals sound and healthy? If not, give full particulars of defects or ailment; and (3) Are they or have they been insured elsewhere? Have you had a proposal for L. S. insurance declined? Have you been paid claims? If so, how many, and by whom? They were answered as follows:—Number 2, "Yes"; number 3, "Yes, with Coyle and Co. Dublin." The proposal warranted not only the truth of the statements, but also that the plaintiffs had not withheld any material information. The policy, dated 9th November, 1909, made the proposal its basis; and condition 10

therein was as follows:—[Mr. Justice Gibson read the condition, and continued]—My opinion is not founded on that condition, as to which see *Sceales* v. *Scanlon* (1).

The horse died on October 27, 1910, of inflammation of the bowels, or gastritis. The jury have found that the statements in the proposal were true, and that the refusal of the plaintiff's application by another insurance company and the malformation of the horse's legs were important, that is (as I understand), material to the risk undertaken by the defendants. The jury failed to agree whether information was withheld. In this they apparently disregarded the instructions of the learned Judge as to the meaning of "withheld." Some of them may have taken the view that, if the defendants could be treated as affected by Scollen's knowledge, information as to the matters so known could not be deemed to be withheld.

The evidence was rather loose and inaccurate. The facts relied on by the plaintiff, taking the testimony adduced on his behalf to be correct, were as follows:—'General Symons' was malformed or crippled in his forelegs in such a way that, though his efficiency for stud purposes was not impaired, his capacity for exercise was affected; and, as his general health and digestion might be thereby prejudiced, the peculiarity was one material for insurers to know, as Mr. Ballisty, V.S., examined for the plaintiff, admitted, and as the jury have found. Whether the complaint of which the horse died was caused or aggravated by inability to exercise, does not appear.

The 'General' was insured by a succession of companies for various sums, increased at last to £1000 with the defendants. The first insurers were the Scottish Live Stock Insurance Company; the next, the Army and Navy Insurance Company. In the insurances with both companies Scollen acted as agent. Why the insurance was changed from the former to the latter is not stated. The policy in the Army and Navy Company, dated 20th February, 1907, was founded on a proposal dated 1st February, 1907, not given in evidence but referred to in the policy. The insurance was for one year from the 1st February,

(1) 6 Ir. L. R. 367.

K. B. Div. 1907, to 1st February, 1908, and was for £300 at a premium
1912. of £24 15*s.* 10*d.* The policy contained the usual condition that
TAYLOR any incorrect or untrue statement in the proposal, or non-statement
v. of any material fact, should make the policy void.
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When the year was expired, the Army and Navy Company had the horse specially examined, with the result that on February 24th, 1908, they wrote to the plaintiff and to Scollen declining to renew. The horse was then insured by the plaintiff with the National Live Stock Company (who were apparently not informed of this previous refusal), through Coyle and Company, a Dublin firm, as agents. This policy was not given in evidence, but there was a certificate from Ballisty, dated November 2nd, 1908, to the company that the horse was in perfect health.

On July 17th, 1909, the National Live Stock Company sent a veterinary surgeon to examine the horse at the plaintiff's stables, and, on his report, decided not to renew. This visit was known to plaintiff's groom, but the adverse decision of the company was not communicated to the plaintiff, who might (defendants' counsel suggested), from not receiving the usual renewal notice, have formed some suspicion on the subject. He determined, in the meantime, to be his own insurer. At this period he had horses insured with the defendant company: a sire, "Royal Arch," on proposal, dated 24th November, 1908, through Scollen; a colt, on proposal, dated 23rd November, 1908, through Scollen; and after the date of the policy now sued on, a gelding, "Mollie's Boy," on proposal, dated 3rd February, 1910.

The plaintiff, having been induced by Scollen to insure 'General Symons' with the defendants, left to Scollen the filling in of the proposal, and signed the proposal without reading the answers. It is to be noted that similar answers (as far as regards omission to disclose the refusal of 24th February, 1908), in the plaintiff's own writing, are found in the proposals for insuring the plaintiff's other horses with the defendant company.

Scollen, who was station-master at Mullingar, began to act for the defendants, as their agent, in procuring insurances some time after the refusal of renewal by the Army and Navy Company in February, 1908. The date is not accurately fixed; according to Porter it was a little under three years before the trial

(*i.e.*, June 8th, 1911). The first insurance effected for the plaintiff by Scollen was in November, 1908. The *onus* of proving when Scollen's agency began obviously rests on the plaintiff, who has to prove notice imputed through Scollen.

Scollen had never seen the horse, but he had acquired, from Taylor and otherwise, information as to the malformation. There is, however, no evidence that he was ever made aware that the horse's condition, though not constituting unsoundness, was (as stated by Ballisty, and as the jury have found) material to be made known to the company as affecting the risk. According to Ballisty, on the occasion of his examining the 'General' on November 3rd, 1909, Scollen said to him (apparently untruly) that the company knew all about it, and had decided to take the horse notwithstanding his legs, if he was otherwise sound. Scollen denies this: the certificate does not mention the malformation.

On the occasion when the proposal was signed, it is not suggested by counsel that any reference was made to the malformation, or to the refusal to renew in February, 1908. This latter matter the plaintiff knew (as he admits) was important, and he says that, had he read the proposal, or filled in the answers himself, he would have answered differently and would have told the company that the horse had been refused.

It was conceded by Serjeant Moriarty before us, as well as at the trial, that, in filling in the proposal as he did, Scollen acted as the plaintiff's agent, and that the plaintiff was bound by the terms of the proposal. Scollen excused himself for the omission of the Army and Navy Company's refusal by saying that he had forgotten about it. He added that it was only necessary to mention the last company insuring.

On the above facts, taking the testimony adduced for the plaintiff as true, and all imputation of fraud having been withdrawn, was a verdict rightly directed on the ground that material information had been withheld? There would be no breach of the common law obligation to disclose if the information was already possessed by the insurers. Whether the same principle applies to omission to answer specific material questions, with warranty attached, where the alleged knowledge

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is attributable to a person like Scollen, who has to forward the answers to a company for their consideration, may be somewhat different; but, for the purpose in hand, I shall assume in the plaintiff's favour (without so deciding) that Scollen's knowledge in course of agency duty would be an answer to non-disclosure in respect of matters so known.

There may be a distinction between Scollen's knowledge of the horse's physical malformation and his knowledge of the refusal. The former point—directly concerning the subject-matter insured, and not collateral—was present to his mind, and was discussed with Ballisty. Still his information, which was not the result of inspection, was acquired before and apart from his agency with defendants: the malformation was not spoken of between him and the plaintiff when the proposal was signed; and Scollen was not apprised that the malformation was, or might be, material to the insurance risk. On the above question as to imputation of knowledge in respect of malformation, I do not deem it necessary to pronounce any concluded opinion.

My decision is entirely based on the refusal of February, 1908, which occurred before Scollen became defendants' agent, and Scollen's knowledge of which was, in any case, outside his duties as agent in relation to the policy sued on.

To affect a principal with imputed knowledge, there must be a duty on the agent's part to communicate. How was Scollen under any legal obligation to defendants to remember the incident of February, 1908? Can the defendants' contractual rights depend on the accident of Scollen's recollection, or his forgetfulness or oversight? He was a canvasser, and his employers required the protection of written answers. The danger of making the agent's memory of bygone transactions a jury question, and enabling contractual obligation of full disclosure to be thereby qualified or reduced, is obvious. To reach the employer, the knowledge must be got in the course of the agency, and in such a way as to affect the particular contract. The agent's duty to inform his principals must be not merely a moral duty, but a legal obligation: *Wyllie* v. *Pollen* (1).

(1) 3 De G. & J. & S., at p. 601.

Hence, antecedent knowledge obtained before the agency, or casual information detached from the contract, cannot be imputed. This appears to be now the received view of the profession as appears from the text-writers, such as Evans on Principal and Agent (where the law is well summarized); Bowstead; and Lord Halsbury's Laws of England. The contractual rights of a principal cannot depend on the state of an agent's memory of past transactions; if they did, it would be better to employ an agent of small experience or with a short memory rather than one of wide experience or retentive memory; and whether the agent's memory was good or bad, the matter of recollection would always be a jury question.

The rule laid down in *Worsley* v. *Earl of Scarborough* (1), that notice to the agent must be in the particular transaction, is now adopted in the Conveyancing Act, 1882, section 3. The enactment is expressed in negative terms; it is retrospective; is not confined to solicitors; and its definition section extends it to personal property, debts, choses in action, and any other right or interest in the nature of property, whether in possession or not. The object of the enactment is explained in *Re Cousins* (2); and in *Bailey* v. *Barnes* (3). It prohibits imputation of notice as a matter *positivi juris*, as the Vice-Chancellor held it ought to be in *Fuller* v. *Bennett* (4). In common law cases, particularly mercantile cases, as to which see *Manchester Trust* v. *Furness* (5), it is hard to imagine that any different principle is to be applied. The Marine Insurance Act, 1906, c. 41, sections 18, 19, and 20, relied on by the plaintiff's counsel, tell against him. Section 18, sub-sect. 3, does not refer to agents, *eo nomine*, and has prefixed the words, "in the absence of inquiry." Sections 19 and 20 deal with knowledge of the assured's (not the insurer's) agent, in marine insurance usually a broker, whose knowledge, from his position, would be understood by the parties to be applicable to the particular insurance, though it might have been acquired before the actual contract.

(1) 3 Atkyns, 392.
(2) 31 Ch. Div. 671.
(3) [1894] 1 Ch., at p. 35.
(4) 2 Hare, 394.
(5) [1895] 2 Q. B., at p. 545.

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The authority most in favour of imputing antecedent knowledge possessed by an agent is *Dresser* v. *Norwood* (1), where the Exchequer Chamber held that a broker's knowledge affected his employer. The question was one of set-off claimed by a purchaser who had bought from a factor. The right of set-off depended on the buyer having been induced to believe that the factor was selling on his own account. Where a factor sells, he occupies an equivocal position; he may be principal or agent; the purchaser is put on inquiry, and must prove that he was in fact misled: *Cooke* v. *Eshelby* (2).

In *Dresser* v. *Norwood* (1), the agent was a broker, a person very different in character from a country insurance agent or canvasser; his knowledge was gained in close proximity of time; and the duty of a broker involves acquirement of such knowledge in ordinary course of business. Where an agent buys for an undisclosed principal, if the latter claims the benefit of the contract, he could hardly repudiate the knowledge possessed by the agent, and the same principle might apply where the vendor seeks to impose the burthen of the contract on the principal when disclosed. The judgment in *Dresser* v. *Norwood* (1) expressly confines its application to mercantile transactions of the description there before the Court, and does not profess to lay down a rule of universal application. It is so explained in Evans on Principal and Agent. In Bowstead and in Lord Halsbury's Laws of England, it is not cited in reference to imputation of antecedent notice; and in the notes to *Le Neve* v. *Le Neve* (3) the case is not mentioned at all. Whatever may be the effect of *Dresser* v. *Norwood* (1) it does not introduce into the general law of contract a rule contrary to the Conveyancing Act, 1882.

Where a broker is employed—whether in marine insurance or otherwise—the principal may be affected by knowledge which the nature of the broker's business would naturally enable the latter to possess, but in all such cases the notice is closely connected in point of time with the particular contract:

(1) 17 C. B. (N. S.) 466.
(2) 12 A. C. 271.
(3) 2 White & Tudor.

Blackburn v. *Vigors* (1); *Blackburn* v. *Haslam* (2). In these cases the notice was sought to be attributed to the insured, not to the insurers.

In none of the insurance cases relied on for the plaintiff, where the insurers were held bound by the agent's knowledge, was such knowledge acquired otherwise than in discharge of duty in relation to the particular contract. *Bawden's Case* (3) (plaintiff's main authority) turned, as the judgment of Kay, L.J., explains, on the conduct and knowledge of the agent in course of duty, and in the actual negotiation of the policy. The case is a peculiar one. An illiterate, one-eyed man, in good faith, at the instance of the company's agent, made a proposal, which seemed in terms to apply to a person without defects, and possessed of two eyes. The Court held that the contract must be construed with reference to the known facts present to the minds of the parties, and also that the agent was guilty of breach of duty. The same result might have been arrived at by a different process of reasoning—estoppel, rectification, or the view that the policy was not procured by a representation known to be contrary to the fact or mistaken. Knowledge derived from personal inspection of the person or thing insured, contemporaneous with the insurance, is wholly different in character and consequence from knowledge of a collateral matter affecting the risk, acquired previously and detached from the contract. I hold, therefore, that the knowledge acquired by Scollen in February, 1908, cannot affect the defendants, and that the case (as between plaintiff and defendants) must be dealt with as if Scollen had never heard of the refusal to renew. On that assumption, how does the matter stand?

Scollen was the plaintiff's agent in filling the proposal, and the plaintiff is thereby bound. Serjeant Moriarty admits the point, which is indeed decided in *Biggar's Case* (4). Taylor was an educated man, had effected many insurances, and was aware of the materiality of the refusal of February, 1908. He attempts to put the blame of the omission to disclose such refusal on Scollen; but, if the latter was his agent, such excuse is of no

(1) 12 A. C. 531.
(2) 21 Q. B. D. 144.
(3) [1892] 2 Q. B. 534.
(4) [1902] 1 K. B. 516.

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avail. Scollen, thinking only of his commission, was acting entirely outside the duty he owed the company; and Taylor who ought to have known this, cannot be heard to say otherwise, or to claim, by reason of Scollen's default, exoneration from the obligation to disclose the rejection known by him to be material.

The jury have found that the answers in the proposal are true. As to question 3, the answer was, no doubt, true so far as it went. The jury possibly meant to acquit the plaintiff of any intention to mislead in passing by the rest of the question. They have found, however, that the information as to refusal was important. Without such finding, the question by itself shows that the information was to be treated as material, and the plaintiff admits that it was material. The information was "withheld" when, it being the plaintiff's duty, by contract as well as by common law obligation, to give it, he failed to fulfil such duty. The verdict was, therefore, rightly directed for the defendants.

I would add, to avoid misconception, that on two points I abstain from offering any opinion: (1) as to the malformation; (*a*) whether Scollen's knowledge was acquired and possessed under circumstances which would render it imputable to the defendants; (*b*) whether knowledge of malformation, not constituting unsoundness, without information as to its affecting the insurance risk, would free the plaintiff from making full disclosure on the subject.

(2) As to the refusal; whether (assuming that previous knowledge might in certain conditions be carried forward into the contract period), having regard to the character of Scollen's agency and duty to his employers and to the questions and warranty which the plaintiff was contracting to answer and give in writing, the knowledge of Scollen could affect or qualify the plaintiff's contractual obligation—as to which the Marine Insurance Act, 1906, section 18, sub-sect. 3 (as to inquiry), probably representing a general principle of insurance law, *Thomson* v. *Weems* (1), may be referred to; and whether the

(1) 9 A. C., at p. 684.

governing authority is not *Biggar's Case* (1), where, no doubt, the contract differed from that before us, rather than *Bawden's Case* (2). It was to this latter point that the attention of my brother Dodd was mainly directed at the trial, counsel not adverting to the distinction on which my judgment is based, that knowledge unconnected with the contract, and acquired during agency for another company, could not be attributed to the defendants.

BOYD, J., concurred.

Solicitor for the plaintiff: *Nicholas J. Downes.*
Solicitor for the defendants: *Stritch and Stritch.*

C. N. K.

THE KING (AHERN) *v.* THE RECORDER OF CORK (3).

Justices—Dangerous wall—Order to take down or repair—Right of appeal to Quarter Sessions—Effect of decision of Justices as to ownership of wall—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 75—*Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *ss.* 39, 93—*Petty Sessions (Ireland) Act*, 1851 (13 & 14 *Vict. c.* 93), *s.* 24.

An appeal to Quarter Sessions does not lie under section 24 of the Petty Sessions (Ireland) Act, 1851, from an order of Justices made under section 75 of the Towns Improvement Clauses Act, 1847 (incorporated in the Towns Improvement (Ireland) Act, 1854), ordering the owner of a dangerous wall to take it down, rebuild, or repair it, even though the expense involved in doing the work may exceed forty shillings.

Semble, although the Justices in making such order have jurisdiction to inquire who is the owner of the wall, in order to ascertain whether the proper notices have been given, that inquiry is one preliminary to the exercise of their jurisdiction, and their decision as to ownership is not conclusive in a subsequent proceeding to recover the expenses.

CERTIORARI.

The prosecutor herein, John Ahern, Surveyor to the Queenstown Urban District Council, was the complainant in a summons

(1) [1902] 1 K. B. 516. (2) [1892] 2 Q. B. 534.
(3) Before PALLES, C.B., and GIBSON and BOYD, JJ.

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in which J. B. Tonson Rye and Patrick Allen were defendants. The summons set out as follows:—

"Whereas, a complaint has been made to me that a certain wall, that is to say the wall on the grounds of East Hill House in the occupation of the defendant Patrick Allen which adjoins the public road at East Hill in the urban district of Queenstown and within the Petty Sessions district of Queenstown and county of Cork is in a ruinous state and dangerous to passengers, and that on the 5th day of May, 1911, notice in writing of the premises under the hand of the complainant John Ahern the Surveyor of the said urban district duly appointed, was given and served upon you said defendants as owner and occupier of said wall requiring you to forthwith take down secure or repair said wall, and that you have not heretofore begun to take down secure or repair the same within three days from the giving or serving of such notice upon you, or otherwise complied with said notice: This is to command you to appear as defendants on the hearing of said complaint at Queenstown Petty Sessions in said county on Wednesday the 17th day of May at 11 o'clock a.m. before such Justices as shall be present to show cause why an order should not be made upon you or one or more of you to take down rebuild or repair or otherwise secure such wall or such part thereof as appears to them to be in a dangerous state to the satisfaction of said John Ahern the complainant as such surveyor as aforesaid within such time as shall be fixed by said Justices."

The summons came on for hearing before the Justices sitting at the Petty Sessions District of Queenstown on the 17th May, 1911, and an order was made by them directing that the owner, J. B. Tonson Rye, or in his default the occupier, Patrick Allen, of the premises on which the wall stood, should within one month from service of the order "take down rebuild repair or otherwise secure the same to the satisfaction of said surveyor, and that in default the Queenstown Urban District Council, the commissioners appointed by statute for the purpose, do proceed therein as directed by the statute in such case made and provided."

The defendants appealed from this order to the Recorder and Justices of the county of Cork. The form of appeal was Form H in

the schedule to 14 & 15 Vict. c. 93. The appeal came on for hearing before the Recorder of Cork on the 29th May, 1911. Counsel for the complainant in the summons objected to the appeal being entertained, on the ground that an order made under 10 & 11 Vict. c. 34, sect. 75, was not appealable, not being controlled by section 93 of 17 & 18 Vict. c. 103; and that as no sum was adjudged or penalty imposed, no appeal lay from the order of the magistrates. The Recorder heard the appeal, and made an order reversing the order of the Court below, and dismissing the complaint on the merits without costs.

It did not appear, either from the order of the Justices or that of the Recorder, what the expense would have been of doing the work ordered to be done by the Justices.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the order of the Recorder of Cork, on the ground that it was made in excess of and without jurisdiction, inasmuch as the order of the Justices was made in pursuance of 10 & 11 Vict. c. 34, sect. 75, from which no appeal to Quarter Sessions lay.

Mr. J. B. Tonson Rye, in an affidavit made by him and filed by way of cause against making the conditional order absolute, alleged that the wall in question was not his property. In an affidavit also filed on behalf of Mr. Rye, and made by a civil engineer, it was stated that the cost of doing the work ordered by the Justices would amount to £25 at least. This statement was contradicted by the prosecutor in an affidavit made by him in reply, in which he alleged that the work could be done at a cost of about £1 5s.

The present application was on behalf of the prosecutor to make the conditional order absolute notwithstanding cause.

A. M. Sullivan, K.C. (with him *J. F. Moriarty*), for the prosecutor:—

The order of the Justices was made under section 75 of the Towns Improvement Clauses Act, 1847, which is incorporated with the Towns Improvement (Ireland) Act, 1854, by section 39 of the latter Act. The Act of 1854 contains a code of procedure,

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the right of appeal being dealt with by section 93, and confined to cases in which "the penalty imposed or the sum adjudged shall exceed the sum of twenty shillings." These words do not cover the present case. The only other right of appeal given by the Act of 1851 is that mentioned in section 41, which clearly has no application. It may be contended that the case comes within the provision in section 24 of the Petty Sessions (Ireland) Act, 1851, giving, in cases of summary jurisdiction, an appeal to Quarter Sessions from an order of the Justices for the doing of anything at a greater expense than forty shillings. We submit, however, that this contention is unsustainable on three grounds:—

First, the special limited right of appeal given by section 93 of the Act of 1854 displaces the general provisions in the previous Act of 1851: *The Queen* v. *Justices of Wicklow* (1); *Reg.* (*Lyster*) v. *Justices of Queen's County* (2); *The King* (*De Vesci*) v. *Justices of Queen's County* (3).

Secondly, an order made by Justices under section 75 of the Towns Improvement Clauses Act, 1847, is not an order made in a case of summary jurisdiction. In making such order they are acting ministerially, not judicially. The section does not contemplate the issue of a summons, as the order to take down or repair may be made although the owner cannot be found.

Thirdly, it does not appear on the face of the order of the Justices or of the Recorder that anything was to be done at a greater expense than forty shillings.

[They referred to *Clarke* v. *Clarke* (4); *The Queen* v. *Justices of Wexford* (5).]

Conner, *K.C.*, and the *Hon. Cecil Atkinson*, for Mr. Tonson Rye.

An appeal lies under section 24 of the Petty Sessions (Ireland) Act, 1851. The procedure under the Towns Improvement Clauses Act, 1847, is not governed by the Towns Improvement (Ireland) Act, 1854. Section 210 of the Act of 1847 incorporated the procedure under the Railways Clauses Consolidation Act, 1845.

(1) [1901] 2 I. R. 130.
(2) *Ibid.*, p. 132, note (1).
(3) [1908] 2 I. R. 285, at p. 302.
(4) [1895] 2 I. R. 451.
(5) [1894] 2 I. R. 81.

Section 157 of that Act gave a right of appeal in case of an adjudication of a penalty or forfeiture. The Petty Sessions Act of 1851, having been passed subsequently, had the effect of extending the right of appeal to all the cases mentioned in section 24. But, even assuming that section 93 of the Act of 1854 deals with appeals under the Act of 1847, this does not cut down the right of appeal given by section 24 of the Petty Sessions Act. The section in the subsequent Act being in general affirmative language, the two sections may stand together: Craies on Statutes, p. 330; *Rex* (*M'Aneny*) v. *County Court Judge of Tyrone* (1). In *The Queen* v. *Justices of Wicklow* (2) and in *Lyster's Case* (3), the decisions went on the ground that the statutes in question constituted a complete code in themselves. The procedure prescribed by the Petty Sessions Act is applicable to all cases except those which can be dealt with out of Petty Sessions: *The Queen* (*Jones*) v. *Barry* (4), *per* Palles, C.B.

The order here is one made by the Justices under their summary jurisdiction. By section 75 of the Act of 1847 the proceedings are to be by "complaint." The word "complaint" designates the initiatory step in summary proceedings of a civil nature, and contemplates the existence of a matter in controversy between two parties: *In re Dillon* (5), *per* Hayes, J. Section 144 of the Railways Clauses Consolidation Act shows that the procedure was to be under the summary jurisdiction, and the proceedings to be instituted by summons. No man is to be deprived of his property without his having an opportunity of being heard: *Cooper* v. *The Wandsworth Board of Works* (6), *per* Erle, C.J. That a summons is necessary in cases of this kind is shown by *Reg.* v. *Mead* (7); *The Queen* v. *Mead* (8); *Debenham* v. *Metropolitan Board of Works* (9).

It is not necessary that the order should show that the expense of doing the work ordered would exceed forty shillings. The Recorder has jurisdiction to decide this, and by entering on

(1) 44 I. L. T. R. 147.
(2) [1901] 2 I. R. 130.
(3) *Ibid.*, p. 132.
(4) Judgments of Superior Courts in Ireland, 202, at p. 204.
(5) 11 I. C. L. R. 232, at p. 238.
(6) 14 C. B. (N. S.) 180, at p. 187.
(7) 46 W. R. 61.
(8) [1894] 2 Q. B. 124.
(9) 6 Q. B. D. 112.

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the hearing of the appeal he must be taken to have decided that the expense would exceed this sum. No objection was made to the hearing of the appeal on this ground.

Moriarty, in reply:—

The Act of 1854 was passed after the Petty Sessions Act, and contains a complete code of procedure in itself. The right of appeal, therefore, must be taken to be limited to that given by section 93. If it had been intended that the right of appeal given by section 24 of the Petty Sessions Act should apply, there would have been no necessity for the express provision in section 93 of the Act of 1854, giving an appeal where the sum adjudicated exceeds twenty shillings, since such right of appeal would have already existed under section 24 of the Petty Sessions Act. The object of section 75 of the Act of 1847 was the protection of the public in cases of imminent danger, and it was intended that the owner of the property should not be able, by appealing, to postpone action in the matter.

Nov. 14.

PALLES, C.B.:—

This is an application for a writ of *certiorari* to bring up for the purpose of being quashed an order of the Recorder of Cork, reversing an order under the Towns Improvement Act (Ireland), 1854 (17 & 18 Vict. c. 103), by Justices at Petty Sessions, to take down and rebuild a wall alleged to be ruinous.

The ground of the application is that an appeal does not lie against such an order.

The order was made under section 75 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. 34), which is one of a group of sections which are, by section 39 of the Act of 1854, incorporated with and form part of the Act of 1854.

The 75th section of the Act of 1847 in substance enacts that if any building or wall be deemed by the surveyor of the Commissioners to be in a ruinous state, and dangerous to passengers or to the occupiers of the adjoining buildings, the surveyor shall immediately cause a proper board or fence to be put up for the protection of passengers, and shall cause a notice

in writing to be given to the owner *if he be known and resident within the limits*, and to be put upon a conspicuous part of the premises or otherwise to be given to the occupier, if any, requiring them to take down, repair, or secure such building or wall, and in default of their beginning to do so within three days, and completing the same as speedily as the nature of the case will admit, the surveyor may make complaint thereof before two Justices, and it shall be lawful for them to order the owner, or in his default the occupier (if any), to take down, rebuild, repair, or otherwise secure such part thereof as appears to them to be in a dangerous state within a time to be fixed, and the section proceeds to authorize the Commissioners, in case the same shall not be taken down within the time limited, or if no owner or occupier can be found on whom to serve the order, to take down the same, and enacts that the expenses thereof shall be paid by the owner. Sections 76, 77, and 78 have for their subject-matter the mode of recovering these expenses. They enact that if the owner can be found within the limits, these expenses may be levied by distress under a Justice's warrant and if he cannot be found within the limits, or if sufficient distress of his goods cannot be found within the limits, a proceeding is authorized enabling the Commissioners to take the building, or land on which it stood, under the Lands Clauses Act, 1845, and deduct these expenses out of the compensation payable, or, if the building has been pulled down, to sell the materials, and out of the proceeds of the sale pay such expenses.

In reference to a matter incidentally mentioned during the argument, I have to say that the effect of these sections is that in many cases the surveyor may proceed without notice to the owner, and in some cases, *i.e.* where the owner is unknown and there is no occupier, may proceed wholly *ex parte*, and that, for this and other reasons apparent on these sections, it appears to me that although the Justices have jurisdiction to inquire who is the owner, in order to ascertain whether the proper notices have been given, that inquiry is one preliminary to the exercise of their jurisdiction, and that their decision as to ownership is not conclusive in a subsequent proceeding to recover the expenses.

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The Justices' order in the present case rightly abstains from directing any payment by the owner.

The sections contemplate the amount to be paid, and, as I think, the person who is owner, being determined by the Justice on the application for the warrant of distress.

I assume that Mr. Atkinson is right in contending, as he did in the course of his very clear argument, that the procedure contemplated by this Act, in proceedings before Justices under this section, is that prescribed by the 8 Vict. c. 20, as to which I shall only remark that the appeal given in that procedure (section 157 of that Act) is only from a "determination or adjudication with respect to any penalty or forfeiture"—words which will not embrace the order here.

However, section 93 of the Act of 1854 gives an appeal against "any order conviction judgment or determination" of Justices, to the Quarter Sessions holden next after the accrual of the cause of complaint, in any case in which the penalty imposed or the sum adjudged shall exceed twenty shillings. Like the Act, however, of 1845 (8 Vict. c. 20), it omits to give an appeal from an order, such as that in question here, for the doing of an act other than the payment of money.

The defendant, however, contends that he is entitled to appeal under section 24 of the Petty Sessions Act, 1851 (14 & 15 Vict. c. 93), which provides an appeal to the Recorder at his Sessions which shall commence seven days from the date of the order in any case of summary jurisdiction where an order shall be made "for the doing of anything at a greater expense than forty shillings." I note, lest it may be said that I have overlooked it, that the Justices have not jurisdiction under the Act of 1854 to determine the amount of the expense of doing the thing ordered to be done; and it may hereafter be a question, upon which I do not enter here, whether an order under such a jurisdiction can be aptly described as one not only for doing the act, but for doing it "at a greater expense than 40*s*." I think it open to argument that, to come within the words I have quoted from the Petty Sessions Act, the order must not only order the thing to be done, but must in some way adjudicate that the expense of doing it exceeds the statutory minimum.

However, I pass over that question to determine that upon which alone we determine this case:—

Does section 24 of the Petty Sessions Act, 1851, authorize an appeal to the Recorder from the order here, assuming that the expense involved in doing the act exceeds 40*s.*?

Now the Act under which the order is made is one subsequent to the Petty Sessions Act of 1851. Although the clause under which the order is made is found in a Clauses Act of 1847, it had no legislative force in Cork until it was incorporated in the Act of 1854. It is part of the Act of that year. I have no difficulty in holding that *prima facie* the procedure laid down in the Petty Sessions Act applies to proceedings before Justices in Petty Sessions under subsequent as well as previous statutes, so that the question is reduced to this—Does the 93rd section of the Act of 1854 negative the *prima facie* implication that section 24 of the Petty Sessions Act applies to procedure under the latter Act?

I am of opinion that it does, upon the well-known principle, *expressum facit cessare tacitum*. Section 93 of the Act of 1854 gives an appeal against some, but some only, of the orders of Justices made thereunder. No doubt it does not contain negative words such as the words "but in no other case," found in the Act of 1851; but it is impossible to contend that, as against orders within the 93rd section of the Act of 1854, there could be appeals under the 24th section of that of 1851. The Courts to which the appeal is given by each of these Acts are not identical, and the conditions of appeal are different. As to these orders, we must give effect to the provisions of the Act of 1854; and we cannot hold that in respect of the one order there can be two separate appeals to different Courts under different procedures. It follows, consequently, that the appeal section (24) in the Petty Sessions Act cannot apply in its entirety to orders under the Act of 1854. Why this change? We must, in my opinion, impute to the Legislature knowledge of the 24th section of the Petty Sessions Act, and that in their wisdom they thought it advisable to limit the right of appeal against orders made thereunder to the classes of order mentioned in the latter Act. Mr. Moriarty in the course of his able reply has suggested reasons for this limitation. These reasons may or may not have been within the cognizance of

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Parliament, but I prefer to rely upon the words they have used. Instead of saying nothing as to appeal, having the Act of 1851 before them, they deliberately depart from the appeal provisions contained in it, and provide others as more suited to the purposes of the legislation before them. Having regard to the rule that an appeal must be given by express and clear words, I am of opinion that I better carry out the intention of the Legislature by holding that, in reference to all orders under the Act of 1854, they substituted the appeal provisions in that Act for those of that of 1851, than by determining that they intended that there should be an appeal under one of those Acts from one class, and under the other from another class, of order under the Act of 1854.

I consequently am of opinion that section 24 of the Petty Sessions Act does not apply to the order in question here.

GIBSON and BOYD, JJ., concurred.

Solicitors for the prosecutor: *Hanrahan & Co.*
Solicitors for Mr. Tonson Rye: *Thomas Exham & Son.*

J. G. T.

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May 19, 20.

THE MULLINGAR RURAL DISTRICT COUNCIL *v.* ROWLES (SURVEYOR OF TAXES) (1).

Revenue—Local authority supplying water—Profit on water rents—Liability to income tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35); *Taxes Management Act*, 1881 (43 & 44 *Vict. c.* 19); *Public Health* (*Ireland*) *Act*, 1878 (41 & 42 *Vict. c.* 52).

A local District Council by virtue of the provisions of the Public Health (Ireland) Act, 1878, provided waterworks for the purpose of supplying water to the inhabitants of their district, and thereby made a profit.

Held, that such profit was a profit within the meaning of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and therefore liable to income tax.

CASE Stated under the provisions of 43 & 44 Vict. c. 19, section 59.

The case stated set out that the Mullingar Rural District

(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.

Council had appealed against an assessment made upon them under Schedule D of the Income Tax Acts for the year ending 5th April, 1911, in the sum of £247 in respect of the profits arising out of certain waterworks carried on by them which had been constructed under the provisions of the Public Health (Ireland) Act, 1878, and after referring to and quoting sections 61 (1), (2), (3); 232 and 233 of the said Public Health Act, the case proceeded as follows :—

4. To meet the general expenses incurred by the Mullingar Rural District Council in the execution of the Public Health (Ireland) Act, 1878, a "General Rate" is struck by the County Council on all ratepayers within the waterworks area, whether such ratepayers take the water or not. Such rate is levied as part of the poor rate under the provisions of section 233, quoted.

5. A "Special Rate" is collected by the Mullingar Rural District Council (under section 66 of the Act quoted) on all persons who take in the water. If the pipe for supplying the water does not exceed half an inch, the consumer is charged a 9*d.* rate on his valuation; but if the pipe exceeds half an inch, then the consumer has to pay by meter. The Mullingar Rural District Council do not supply water to any persons except to those ratepayers who make application to be so supplied, and the said Council have no power to supply water to persons outside their rural district.

6. The duties for Income Tax for the years 1910–1911 were granted by the Finance Act, 1910, section 3 (1), and by section 3 (2) of said Act all previous enactments relating to Income Tax were continued in force.

7. The rules for assessing and charging the several duties are contained chiefly in the Act 5 & 6 Vict. c. 35. By section 40 of that Act it is enacted that all corporations, companies, or societies, whether corporate or not corporate, shall be charged with the duties; and the chamberlain or other officer acting as treasurer shall be answerable for doing all such things as are required by the Act to be done in order to assessment.

8. The waterworks of the appellant are charged and assessed to the duties in the manner directed in Schedule A, No. 3, of the Act 5 & 6 Vict. c. 35, and under the 8th section of 29 Vict. c. 36,

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according to the rules prescribed by Schedule D of the first Act, so far as such rules are consistent with the said No. 3. The provisions of the said Schedule A, No. 3, so far as material, are as follows :—

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited :—(1) of quarries of stone, slate, limestone, or chalk, on the amount of profits in the preceding year ; (2) of mines of coal, tin, lead, copper, mundic, iron, and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act ; (3) of iron works, gas works, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigation, docks, drains, and levels, fishings, rights of markets and fairs, tolls, and other ways and railways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding, the duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or any other person whatever having a claim on or out of the said profits, and all such persons, corporations, and societies respectively, shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern."

9. The following is a copy of the waterworks account for the year ended March 31st, 1910, as supplied to the Surveyor of Taxes by the Clerk of the Council :—

MULLINGAR RURAL DISTRICT COUNCIL.

Statement of Waterworks Account for the year ended 31st March, 1910.

HALF-YEAR ENDED 30TH SEPTEMBER, 1909.

Receipts.				*Expenditure.*			
Water rents, . .	£236	0	9	Repayment of loans, .	£233	13	8
Demand on County Council, . .	180	0	0	Salaries, . . .	60	0	0
				Other expenses, .	86	11	0

HALF-YEAR TO MARCH, 1910.

Water rents, . .	£382	4	8	Repayment of loans, .	£234	5	3
Demand on County Council, . .	180	0	0	Salaries, . . .	60	0	0
				Other expenses, . .	253	2	1
Total, .	£978	5	5	Total, .	£927	12	0

10. The "Receipts," £978 5*s.* 5*d.*, in such account consist solely of water-rents, referred to in paragraph 5 hereof as a "special rate, and "Demand on County Council," referred to in paragraph 4 hereof as "General Rate."

11. [This paragraph of the case stated set out the details of the "Expenditure" in the Account, showing a total of £927 12*s.*]

12. In the course of the appeal the Surveyor of Taxes submitted the following statement of the amended liability to income tax of the appellants:—

Receipts.

Water-rents (half-year ended 30th September, 1909), . .		£236	0 9
Do. (half-year ended 31st March, 1910), . . .		382	4 8
		£618	5 5
General water-rate (half-year ended 30th Sept., 1909),	£180		
Do. (half-year ended 31st March, 1910),	180		
		360	0 0
Total receipts,		£978	5 5

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Total expenses per account,			£927 12 0
Deduct.			
Repayment of principal,	£200 0 0		
Interest paid in full to Board of Works (allowed in final calculation),	267 18 11		
Income tax,	13 10 0		
Extensions,	128 0 0		
		609 8 11	
Admissible working expenses,			£318 3 1

(say £318), apportioned as under—

Total Receipt Water-rents and Rates.	Receipts from Water-rents.	Working Expenses common to both sources.	Proportion of Expenses applicable to Water-rents.
£978	£618	£318	£202

Water-rents,		£618	
Less proportion of expenses applicable thereto,		202	
		£416	
Deduct interest paid in full to Board of Works,	£267 18 0		
Less interest received in full by the Council on moneys in hands of the Treasurer,	57 5 0		
		210 13 0	
		£205 7 0	
Amended liability (say),		£205 10 0	

13. The appellants contended that under section 233 of the Public Health (Ireland) Act, 1878—previously quoted—the rural sanitary authority, as the District Council was then called, was authorized to levy the general expenses as part of the poor rate, and under section 66 of the Act previously quoted, when the sanitary authority supply water to premises, it can charge a rate to be assessed on the annual value, or it can enter into agreements with the persons receiving the supply, and may recover the water-rates or money payable under such agreements in a summary manner.

The appellants further contended that the effect of the Local Government Act, 1898, was to transfer to the County Council the collection of the rate under section 233—previously quoted; but,

as was decided in the case of the *Rathdrum R. D. Council* v. *Saul* (1), the powers under section 66 remain vested in the sanitary authority; and hence that there is no distinction in point of law between the two methods of collecting the expenses of the sanitary authority under the section. The appellants further contend that they do not and cannot trade in water with ratepayers within the rural district of Mullingar, of whom the appellants are only representatives, and to whom the appellants only supply water by contract, pursuant to their statutory obligations in that behalf.

In the circumstances set forth the appellants contended that no liability to income tax existed, and therefore asked that the assessment be wholly discharged.

14. The surveyor of taxes, on behalf of the Crown, maintained that there was a material distinction between the two methods of collecting the expenses of the sanitary authority under the sections quoted, inasmuch as the County Council collects its rate whether the person upon whom the rate is levied is a consumer of water or not. This rate is therefore compulsory.

The District Council, on the other hand, levies its rate only on consumers who voluntarily enter into contracts to buy water. This rate is, therefore, *non-compulsory*. The District Council has the power of collecting money due in the same manner as an ordinary trader; but the rate itself, which is levied on the basis of valuation or capacity of pipe, is quite optional, the District Council standing in the same relationship to income tax as would a private trader who supplies water on similar terms. It is entirely within the discretion of the occupier of any premises to enter or not into a contract for the supply of water with the District Council. The latter act as purveyors of water, and the occupiers who elect to consume the water are its customers. The purveyors and the purchasers of water are not the same group of persons, the purveyors being the whole body of the ratepayers as represented by the Rural District Council, and the purchasers only those of the ratepayers who contract with the Rural District Council to be supplied with water. Trading in the ordinary sense, therefore, exists, and, consequently, *prima facie* liability to income tax.

(1) 39 I. L. T. R. 270.

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The surveyor further contended that the present case falls clearly within the judgments given in the case of the *Glasgow Corporation Waterworks Commissioners* v. *Miller* (1); and the *Dublin Corporation* v. *M'Adam* (2), in which it was held that the excess of income over expenditure in respect of non-compulsory water-rates constitutes a profit assessable to income tax.

15. The commissioners reserved their decision, and subsequently reduced the assessment to £205 10*s*., in accordance with the calculation of the surveyor in paragraph 12 hereof.

James O'Connor, K.C., and *Denning*, for the Mullingar Rural District Council.

Molony, K.C., and *Coll* (with them the *Solicitor-General* (*Ignatius O'Brien, K.C.*)), for the Surveyor of Taxes.

The arguments addressed to the Court are stated in the judgment; in addition to the authorities therein referred to, the following were cited by counsel: *Rathdrum Rural District Council* v. *Saul* (3); *Dillon* v. *Haverfordwest Corporation* (4); Halsbury's Laws of England, vol. xvi, pp. 625, 626.

May 20.

PALLES, C.B.:—

The District Council of Mullingar having provided waterworks under the Public Health Act, 1878, imposed certain rates upon persons who desired to obtain a supply of water, and the question we have to determine is, whether the profit thereby made by the Council is assessable to income tax.

Under the provisions of the Act an obligation is imposed on the sanitary authority (now the District Council) to provide a supply of water to any ratepayer within the district who asks for it in the mode prescribed by the Waterworks Clauses Act, 1847; and, in such a case, there are certain modes by which the person thus supplied is made liable to an obligation to pay for the special advantage he thereby gets. I decline to adopt the construction

(1) 13 Ct. of Sess. Cas. (4th series), pt. ix, 489.
(2) 20 L. R. Ir. 497.
(3) 39 I. L. T. R. 270.
(4) [1891] 1 Q. B. 575, p. 579.

suggested by Mr. O'Connor. He says that in substance the plan of the Act is that all the inhabitants, or at least all the occupiers of rateable hereditaments, in the town should be supplied with water. In my opinion the scheme of the Act is the exact contrary. Under it the only persons who, under ordinary circumstances, are bound to get water are those who are willing to take it; although if a necessity arises by reason of a person not having any water-supply elsewhere, and there are *special* circumstances that render it advantageous to the public that his premises should be supplied with water, there is power to force him to take water. Speaking generally, however, and leaving special cases out of consideration, the taking of a supply of water was intended to be the voluntary act of the occupier of the rateable premises. Then section 66 provides how that water-supply is to be paid for:—

"Where a sanitary authority supply water to any premises they may charge in respect of such supply a water-rate to be assessed on the net annual value *of the premises*, to be made, assessed, and levied, in like manner in every respect as the rate out of which the expenses incurred by such sanitary authority in the execution of this Act are defrayed; moreover, they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and may recover water-rents or other moneys payable under such agreements in a summary manner." The word "premises" here means the premises to which the water is supplied; and this section does not authorize a general rate on the occupiers of all the rateable hereditaments, some of whom have not required a supply.

By a later section (68), "a sanitary authority may agree with any person to supply water by measure, and as to the payments to be made in the form of rent or otherwise for every meter provided by them."

It appears to me to be immaterial whether the mode of levying the money payable in respect of the supply is by a water-rate as prescribed by the first limb of section 66, or by the agreement contemplated by the second limb of that section, or by meter. Whichever of these modes be adopted, there is a certain special class, occupiers of rateable hereditaments, in the town of Mullingar, all of whom have required and procured this water-supply, and

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who, in respect of this special advantage, are bound to pay to the Council sums either agreed upon or fixed according to their respective ratings. But this District Council represents the entire municipality of Mullingar, and any money raised under this 66th section becomes the money of the ratepayers generally, and is applicable to the payments of those ratepayers generally. There are, therefore, two classes; one class being the customers for water, and the other, the Council itself, an incorporated body which represents all the ratepayers within the district of Mullingar. There plainly is no identity in interest between these two classes, nor, by reason of the incorporation of the Council, is there any identity in person. There is not the slightest difficulty, in point of law, in their dealing with each other, as for instance in one, the District Council, selling water to any of the other class.

Graff v. *Evans* (1) has no application, because there the club was not incorporated; and if the judgments are examined, it will be found that they went upon that ground. The alleged purchaser there was held to have had a ten-thousandth part of the property in the whiskey, and the purchase was not of the entire of the whiskey, but of the 9999 parts belonging to the persons who were the other members of the club.

The only real question we have to decide is one that has been settled years ago, not only in Scotland and England, but in this country. The judgment in *Corporation of Dublin* v. *M'Adam* (2) is an express decision on this question, a passage from which I shall read, although I have a great objection to quote from a judgment of my own:—"Nor are we considering whether in strictness this payment is a rate or a rent. I think the true ground of decision is that the body to pay is a distinct and separate body from the body to receive, that the relation between the two bodies is that of vendor and purchaser of water, as in the case of municipal inhabitants it is that of principals and agents in respect of that supply; and if there be not something in the 16th section of the Act of 1870 that I will deal with separately, it would appear to me to be perfectly clear, on consideration of these Acts, without reference

(1) 8 Q. B. D., 373. (2) 20 L. R. Ir. 497, at p. 512.

to any of the authorities cited, that the corporation are liable to pay income tax on any profit made in dealing with extra-municipal townships and individuals."

In using those words I did not more than follow the words of Lord President Inglis in *Glasgow Corporation Water Commissioners* v. *Miller* (1). It is not necessary to refer to the previous *Glasgow Case* (2), in which there had been an aggregation of taxable with non-taxable property which necessarily resulted in the entire assessment being set aside. In it the Lord President remarked that, "If any attempt had been made to discriminate between the revenue derived from rates within the limits of the compulsory supply and that portion of the revenue which was raised in the districts beyond the limits of the compulsory supply, he would have been glad to attend to such a distinction." He did come to consider such a distinction in *Miller's Case* (1), and the passage of his judgment which determines this case, and is the *ratio decidendi* of *M'Adam's Case* (3), is as follows:—

"In so far as the Commissioners sell water, either by measure or for a consideration fixed by supply agreement, or in return for a non-compulsory rate as the price of the water, they are, in every sense of the term, trading or trafficking in water, and their surplus revenue thus derived is a profit or gain resulting from this trade, within the meaning of Schedule D."

That decision is conclusive upon the question. It was followed by this Court in *M'Adam's Case* (3), by which we are of course bound, and which renders it unnecessary to go into any elaborate discussion of any other of the authorities cited.

Mr. O'Connor endeavours to contend that in respect of the transactions under consideration there is nothing in the nature of trading, because the only person who can get water is the owner of a rateable hereditament; that the assessment is to be according to the poor-law valuation; that the rate is fixed by one party, and not by agreement between both parties. I consider that it is trading, notwithstanding that there is a limited class who alone are permitted to purchase the water, should they so desire; and

(1) 13 Court of Sessions Cases (4th Ser.), pt. ix., p. 489.

(2) 2 Court of Sessions Cases (4th Ser.), 708.

(3) 20 L. R. Ir., at p. 513.

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notwithstanding that the price is one that has been fixed by Parliament, or otherwise, or that the rate is one that has been fixed by one of the parties only; because the other party need not apply for the water unless he is willing to pay that price. The essence of trading in this sense is buying and selling—that the property in a subject-matter passes from one person to another in consideration of a price to be paid by that other. The property in the water in the present case passes, and the amount of the rate is its price, and is to be paid to this District Council by the person who gets the water. When both parties are identical, there cannot be a sale; but I have shown that here they are distinct in fact and in law. There, therefore, is everything necessary to constitute a sale.

In result then, we are of opinion that the profit made by this District Council by reason of their supplying water under the provisions of the 66th section of the Public Health (Ireland) Act to the ratepayers of Mullingar is a profit within the meaning of the Income Tax Act; and, therefore, liable to income tax; and, accordingly, we confirm the decision of the Commissioners. On the whole we think that the case is not one for costs.

KENNY and WRIGHT, JJ., concurred.

Solicitor for Mullingar Rural District Council: *N. Downes.*
Solicitor for Inland Revenue: *Richard Martin.*

J. M.

THE KING (FITZGERALD) *v.* McDONALD (1).

K. B. Div. 1912. April 17.

Old Age Pensions Committee—County Council—Committee not validly elected —Quo warranto—*Regulation enabling appointing Council to remove member of committee—Validity of—Old Age Pension Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 8 (1); *s.* 10 (1) (*c*)—*Old Age Pension Regulations*, 1908, *Reg.* 21 (3) (*d*)—*Schedule to Local Government* (*Application of Enactments*) *Order*, 1898, *Art.* 36 (10), vi. viii.

The term of office of a local pension committee appointed under the Old Age Pensions Act, 1908, having expired, a resolution was passed at a meeting of the County Council purporting to appoint a new committee which included M. as one of the members. The summons convening the meeting of the County Council had not, as required by Art. 36 (10) vi, of the Schedule to the Local Government (Application of Enactments) Order, 1898, specified the appointment of such committee as business to be transacted at the meeting. An application having been made for an information in the nature of a *quo warranto* against M.:—

Held, that the committee not having been validly appointed, there was no existing office, and therefore *quo warranto* did not lie.

Quaere, is Regulation 21 (3) (*d*) of the Old Age Pensions Regulations, 1908, enabling the appointing council at any time to remove any member of the committee, *ultra vires*?

QUO WARRANTO.

In pursuance of the Old Age Pensions Act, 1908, a special meeting of the Cork County Council had been held on the 18th August, 1908, when a resolution was passed that all the members of the County Council be appointed a pensions committee under the Old Age Pensions Act for the County of Cork, nothing being said as to the term of office. At a meeting of the committee, held on the 29th August, 1908, a resolution was passed appointing Mr. William McDonald chairman of the committee.

On the 31st May, 1911, a new election of County Councillors for the county of Cork was duly held under the provisions of the Local Government (Ireland) Act, 1898.

(1) Before PALLES, C.B., and KENNY and WRIGHT, JJ.

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At the meeting of the County Council held on September 27, 1911, at which thirty-one members out of a total of fifty-two attended, a resolution was passed that the whole council should be the pensions committee. At a meeting of this committee, held immediately afterwards, a resolution was passed unanimously appointing Mr. William McDonald chairman of the committee. Mr. McDonald subsequently purported to act as a member and chairman of the committee. The summons convening the meeting of the County Council held on the 17th September, 1911, did not specify, as a business to be transacted thereat, the appointment of a committee under the Old Age Pensions Act, but with the summons a notice was sent to each member of the County Council convening a meeting of the Old Age Pensions Committee for the 27th September, 1911, for the transaction of the business of appointing a chairman for the following year, and appointing sub-committees.

The relator, Patrick Fitzgerald, who was a Local Government elector for the Skibbereen Rural District in the county of Cork, and was in receipt of an old age pension allotted to him by the Cork County Pensions Committee, now applied pursuant to leave granted by the King's Bench Division, that an information in the nature of a *quo warranto* be exhibited against the said William McDonald, to show by what authority he claimed to exercise the office or franchise of a member of, and Chairman of, the Cork County Local Pensions Committee under the Old Age Pensions Act, 1908, on the grounds that his election to the said office as member of, and chairman of, the said committee was invalid and void by reason of the said election having been held in contravention of the provisions of the Local Government (Ireland) Act, 1908, Application of Enactments Schedule to the Order in Council, 22nd December, 1898, Part II, Art. 36 (10), vi and viii.

M'Sweeny, K.C. (with him *J. M. Fitzgerald*), for the relator :—

The appointment of Mr. McDonald as a member of the pensions committee, and his subsequent appointment as chairman, were void. Notice was not given to the members of the County Council of the intention to appoint a pensions committee at the

meeting of the 27th September, 1911. There was no power, therefore, to appoint such committee: Schedule to Local Government (Application of Enactments) Order, 1898, Art. 36 (10), vi and viii.

Conner, K.C., and *T. Sullivan*, for Mr. W. McDonald :—

Although strict formal notice of the proposed appointment of a pensions committee may not have been given, yet every member of the council knew from the circular that was sent out that this would be part of the business to be transacted at the meeting.

But, even assuming that the appointment of the committee is invalid, *quo warranto* does not lie in respect of the office of a member of a pensions committee. The County Council may, if they think fit, at any time remove any member of the committee, and appoint another person in his place: Old Age Pensions Regulations 1908, Reg. 21 (3) (*d*). *Quo warranto* does not lie in respect of an office held during pleasure: *The Queen* v. *Bayly* (1); *The Queen* v. *Blayney* (2); *Darley* v. *The Queen* (3); *The Queen* v. *Auchinleck* (4); *Bradley* v. *Silvester* (5).

Further, if no committee has been validly appointed, there is no office in existence upon which Mr. McDonald has intruded, and for this reason, also, *quo warranto* does not lie.

The prosecutor has not such an interest as would entitle him to *quo warranto*. The application is not made *bona fide*. The writ is discretionary, and the Court in the circumstances ought to refuse it: *Rex* (*Lynam*) v. *Cork County Council* (6); *Julius* v. *Lord Bishop of Oxford* (7), *per* Lord Blackburn, at p. 246.

The Solicitor-General (*Ignatius O'Brien, K.C.*) (with him, *E. V. Longworth*), appeared for the Crown.

Fitzgerald, in reply :—

Regulation 21 (3) (*d*) of the Old Age Pensions Regulations is *ultra vires*. The power given by section 10 (1) (*c*) of the Old

(1) [1898] 2 I. R. 335.
(2) [1901] 2 I. R. 93.
(3) 12 Cl. & F. 520.
(4) 28 L. R. Ir. 404.
(5) 25 L. T. (N. S.), 459.
(6) 35 I. L. T. R. 167.
(7) 5 A. C. 214.

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Age Pensions Act, 1908, to make regulations as to the term of office of the local pensions committee, authorizes only the making of regulations dealing with the term of office of the committee as a whole, and not a regulation giving power to dismiss an individual member.

Quo warranto lies when a person has been *de facto* elected to, and is acting in, the office: *The Queen* v. *Chester* (1).

If *quo warranto* does not lie, I apply to the Court for a conditional order for a writ of mandamus.

PALLES, C.B.:—

An important question has been raised in reply by Mr. Fitzgerald upon which it is not necessary to express an opinion, that is, whether or not it was competent under the Old Age Pensions Act, 1908 (2), to make a regulation that the County Council might at any time remove a member of the local pensions committee. There is power, no doubt, under section 10, subsection (1) (*c*), to prescribe by regulations the term of office. I quite understand that the term might be fixed as three years, subject to determination as to the whole committee by the County Council, though even as to that a question might arise. But here the provision is that the term of office being a fixed term, power is given, not to reduce that term, but to remove *any one particular member* of the committee at pleasure. I express no opinion as to the validity of such provision; but I am clearly of opinion that this is not a case for *quo warranto*, on the ground that there is no existing office at all. There is power to appoint a local pensions committee, the exact number of members of which it may consist not being prescribed. It is clear to me that the status, if it may be so called, of a member of a non-existing committee, which may consist of any number (within the limits prescribed by Regulation 10 (1) of the Treasury Regulations of 1908), is not an existing office, and cannot therefore be the subject of *quo warranto*. On this ground, without going into the other questions argued, this application cannot be sustained, and must be refused with costs.

(1) 25 L. J. Q. B. 61.

(2) 8 Edw. 7, c. 40.

With reference to the *ex parte* application for a mandamus, I have no doubt that the proper remedy for the very serious infringement of the provisions of the Act which has been brought before us is mandamus; and if no one else applies for such a writ, I should think that it would be the duty of the Crown to do so. But it is elementary law that in the first instance there must be a demand and a refusal. I do not for a moment believe that the County Council will be advised to refuse to act upon a proper demand. The *ex parte* application therefore also must be refused.

KENNY and WRIGHT, JJ., concurred.

Solicitor for the relator: *P. J. Collins.*
Solicitors for W. McDonald: *T. Exham & Sons.*
Solicitor for the Crown: *Malachy Kelly.*

J. G. T.

THE KING CASEY, *v.* URBAN DISTRICT COUNCIL OF TRALEE (1).

Local Government—Urban District Council—Appointment of Town Clerk—Right to prescribe qualifying examination—Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 65—Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), s. 30.

A resolution passed by an Urban District Council that a candidate to be elected by the Council at a forthcoming election to fill the office, then vacant, of Town Clerk, must have passed a qualifying examination, is valid.

But a resolution the effect of which is to interfere with the discretion of the Council at future elections in making future appointments is *ultra vires*.

MANDAMUS.

The clerk to the Urban District Council of Tralee died in the month of March, 1911. At a meeting of the Council, held on the 6th May, 1911, at which eighteen members were present, a resolution was passed, by ten votes to eight: "That seeing the present system of filling up the various salaried positions connected

(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.

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with the Tralee Urban District Council is most unsatisfactory . . . we now adopt the system of filling all such positions, including that of Town Clerk, at present vacant, by means of a qualifying and competitive examination, a thorough knowledge of all matters relating to the proper conducting of municipal affairs being essential in the case of all candidates presenting themselves for the position of Town Clerk."

At a meeting of the Council held on the 21st July, 1911, the following resolution was declared carried by twelve votes to five: "That the appointment of clerk be made by this Council, and that the candidate to be elected must have passed a qualifying examination; that the resolution passed on the 6th May, 1911, be altered accordingly, and that a committee be appointed to arrange particulars for same, subject to the Local Government Board inspectors." Exception was taken to the passing of this resolution, on the ground that it had not been carried by a majority of two-thirds of the members present. It was, however, declared carried. At a further meeting of the Council a committee of six persons was appointed in accordance with the resolution of the 21st July. At a meeting of the Council, held on the 3rd of November, 1911, four of the committee recommended that an examination should be held in the month of February, 1912, for candidates for the vacant office of Town Clerk, the subjects to be reading, writing, composition, arithmetic, and book-keeping, with a general knowledge of certain enactments mentioned in a letter from the Local Government Board on the subject; and that three persons named should be the examiners. As it appeared, however, that one of the proposed examiners had declined to act, the Council decided on taking no action in connexion with the recommendation. Notices of motion for the next meeting were handed in to the following effect: (1) That all resolutions passed relative to the appointment of Town Clerk to the Urban Council should be rescinded; (2) That the acting Town Clerk, Mr. M. O'Connor, should be appointed to the permanent position of Town Clerk at a salary of £165 per annum.

At a meeting of the Council, held on the 4th December, 1911, there were present at first eighteen members, but one of them left the meeting before the above-mentioned notices of motion were

moved, and only seventeen members voted on them. The first-mentioned motion was passed by a majority of ten votes to seven. An objection was taken that the majority in favour of the resolution was less than two-thirds of the members present, but the chairman overruled the objection, and declared the motion carried. The motion appointing Mr. O'Connor Town Clerk was then put, and declared carried by ten votes to five; and Mr. O'Connor was declared by the chairman duly elected to the office. Acting on the resolution, Mr. O'Connor entered upon the said office and continued to act in it.

The prosecutor, a ratepayer in respect of premises situated in the Urban District of Tralee, and an elector for the purposes of the Local Government (Ireland) Act, 1898, obtained a conditional order for a writ of mandamus directed to the Urban District Council of Tralee commanding them to proceed forthwith to the election and appointment of a clerk. Cause having been shown on behalf of the Urban District Council, the present application was on behalf of the prosecutor to make the order absolute notwithstanding cause.

A. M. Sullivan, K.C. (with him *Phelps*), for the prosecutor:—

The appointment of Mr. O'Connor as Town Clerk was illegal, the condition as to passing a qualifying examination not having been complied with. The resolution of the 4th December, 1911, purporting to rescind the former resolutions requiring an examination, was invalid. To enable a subsequent meeting to rescind a resolution passed at a previous meeting, it is necessary, where, as in the present case, the number present at the subsequent meeting is not greater than the number present when the resolution was passed, that the rescission should be carried by a majority of two-thirds of the members present at such subsequent meeting: Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), sect. 44.

Serjeant Moriarty, K.C. (with him *James O'Connor, K.C.*, and *Bernard Roche*), for the Urban District Council:—

The resolutions of the 6th May and 21st July were *ultra vires*. By sect. 65 of the Commissioners Clauses Act, 1847, the Urban District Council are empowered to appoint a clerk. The Council have no right by resolutions of this kind to limit the discretion

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given to them by the statute of making the appointment: *The Queen* v. *Governors of Darlington School* (1). The requiring candidates to pass an examination is a delegation by the Council of their power, and is illegal.

Rearden, for M. O'Connor.

Phelps, in reply:—

The provisions of the Commissioners Clauses Act, 1847, as to the appointment of officers are incorporated with the Towns Improvement (Ireland) Act, 1854, by section 59 of that Act; and section 30 requires the Commissioners to appoint a proper officer to act as clerk. It is right, therefore, that they should see that the officer appointed is a fit and proper person, and there can be no better means of ascertaining this than requiring that he should pass an examination. Assuming that the resolution of the 6th May was *ultra vires*, the subsequent resolution of the 21st July is valid, being confined to the particular occasion of appointing a Town Clerk to fill the vacancy then existing, and requiring merely a qualifying examination.

PALLES, C.B.:—

I am of opinion that the conditional order for a mandamus ought to be made absolute. The appointment sought to be questioned was made under a resolution of the 4th December, 1911, which purported to rescind previous resolutions, especially two, one of the 6th May, 1911, and the other of the 21st July, 1911, relating to candidates for an office submitting themselves to examination. There is no doubt that this resolution of the 4th December, 1911, was inoperative. It was passed at a meeting at which seventeen members were present, and the majority by which it was carried, ten against eight, was less than two-thirds of those present. Section 44 of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), renders it quite clear that this was not sufficient to interfere with the resolutions of the 6th May, 1911, and 21st July, 1911. Serjeant Moriarty, however, contends that these two resolutions are waste paper, by reason of their being beyond the power of the Council to pass them. My opinion is that the

(1) 6 Q. B. 682.

resolution of the 6th May was *ultra vires*, because its effect was to interfere with the discretion of the Council at future elections in making future appointments. The resolution, however, of the 21st July is of a different character. There was an existing vacancy in the office of clerk, and as I read the resolution it refers to the filling up of *that existing vacancy*. The words are—"That the appointment of clerk be made by this Council, and that the candidate to be elected"—that is, the clerk to be elected at the forthcoming election—"must have passed a qualifying examination." In my opinion, that is a valid resolution. I do not think that it attempts to interfere in any way with the obligation and duty thrown on the Council in appointing this officer. In fact, the Council, by the resolution, exercises in part its powers of appointment. It says that in appointing to the present vacancy we shall limit the candidates from whom we shall select the clerk to those who shall have passed a qualifying examination. There is no doubt that the Council could have called the candidates before them, and have themselves examined them by asking them questions in reference to the discharge of their duties, and, in my opinion, it is not a delegation of the duty and obligation of the Council to obtain the assistance of other persons competent to examine the candidates, and to ascertain whether they possess the qualifications the Council consider necessary for the discharge of the duties of the office. It would be a different question if the Council made the examination a competitive one, and bound themselves to appoint the candidate obtaining the highest marks. That, however, is not the nature of the impeached resolution. The examination it required was a qualifying, not a competitive one. On the whole, I hold that this resolution of the 21st July, 1911, confined as it is to the existing vacancy, and requiring merely a *qualifying* examination, was valid. Consequently, the mandamus must go.

KENNY and WRIGHT, JJ., concurred.

Solicitors for the prosecutor: *F. & C. Downing.*

Solicitor for the Urban District Council of Tralee: *Thomas Huggard.*

Solicitor for M. O'Connor: *T. J. Liston.*

J. G. T.

Appeal.
1911.
Dec. 18, 19.

H. L.
1912.
Oct. 17, 18.

SCHAWEL *v.* READE (1).

(1910. No. 10337.)

Sale—Horse purchased for stud purposes—Verbal representation by seller of soundness—Express warranty—Form of question left to jury.

Plaintiff, requiring a stallion for stud purposes, inspected a horse the property of the defendant, a horse dealer. Plaintiff swore that while he was looking at the horse the defendant said to him, "You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I would tell you." Some days afterwards the price was agreed upon, but as plaintiff was purchasing for a foreign Government department, the sale was not finally completed, and the horse was not delivered for about a month. The horse was afterwards found to be affected by an incurable and hereditary disease of the eyes, which rendered him totally unfit for the stud. In an action brought on an express warranty that the horse was sound and free from hereditary disease, the defendant denied that he spoke the above words or anything to that effect, or gave any warranty. The Judge at the trial in charging the jury said, "The question you have to try is—Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes and was sound?" And, after referring to the conflicting evidence, "There was direct contradiction, which of them do you believe?... Did the plaintiff act on that representation in the purchase of the horse?" And he left in writing to the jury (*inter alia*) the question, "Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes, and did the plaintiff act on that representation in the purchase of the horse?" The jury answered in the affirmative.

The defendant's counsel had requested the Judge to leave to the jury the question, Did the defendant warrant the horse sound, or did the defendant represent the horse as sound to his knowledge?

The Court of Appeal, having directed a new trial on the ground that the question actually left to the jury and their affirmative answer to it did not amount to a finding of an express warranty of soundness, and that the Court could not supply the defect by drawing inferences under Order XL, Rule 9 :—

(1) In the Court of Appeal, before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

Held, by the House of Lords, reversing the judgment of the Court of Appeal, that the words deposed to by the plaintiff as having been used by the defendant constituted an express warranty of the soundness of the horse; and that although the word "warrant" or "warranty" did not appear in the question submitted to the jury, that question, especially taken in connexion with the Judge's charge, presented for the consideration of the jury all the elements of what constituted a warranty, and that their answer to it in the affirmative, showing that they believed the plaintiff's evidence, was a clear finding of an express warranty.

APPEAL by the defendant from the order of the King's Bench Division (Palles, C.B., and Gibson and Boyd, JJ.), dated the 16th November, 1911, whereby his motion to enter judgment for him or for a new trial was refused.

The action was brought to recover damages for loss sustained by the plaintiff in the purchase from the defendant of a stallion called "Mallow Man."

The statement of claim alleged (*a*) an express warranty by the defendant that the horse was sound, and free from hereditary disease; (*b*) an implied warranty by the defendant to that effect; (*c*) false representation by the defendant to that effect: and alleged that the horse was unsound, and suffered from a cataract. The statement of defence traversed these allegations, and further alleged that, as far as the defendant knew or believed, the horse was not suffering from cataract or any hereditary disease, infirmity, or unsoundness—that the horse was sold as he stood, subject only to inspection, and that cataract is a patent defect, discoverable by inspection, and that the plaintiff accepted and paid for and took delivery of the horse after such inspection. The plaintiff joined issue.

The action was tried before Lord O'Brien, L.C.J., and a special jury in Dublin on the 4th, 5th, and 8th May, 1911.

On the occasion of the purchase of "Mallow Man" the plaintiff was looking out for stallions for stud purposes for the Austrian Government, and having heard that the defendant, a horse dealer, at Carnew, county Wexford, had a couple for sale, went to that place, and saw the defendant, with whom he had been dealing for twenty years, and in whom he placed much confidence, never employing a veterinary surgeon in his purchases.

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Plaintiff's visit was on the 22nd March, 1910. His evidence as to this was as follows:—

"The horses were pulled out. I think there were four. Two were sent away at once. I did not care for them. We looked at the remaining two, 'Mallow Man' and a chestnut horse. A little later I said I did not want the chestnut. The chestnut was sent away, and 'Mallow Man' left there alone. I walked up to him and looked at him. Defendant said, 'You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I should tell you.' That was all." Plaintiff remained that night at Carnew, and saw the horse again the next day, when he said that for the purpose of getting an export certificate the horse should be examined by a veterinary surgeon, whom he left it to the defendant to select, and Mr. Walsh, V.S., of Carlow, was selected. The plaintiff explained that this was done solely for the purposes of export and not because he had lost confidence in the defendant.

A few days afterwards the defendant dined with the plaintiff at the Shelbourne Hotel, Dublin. When they were going in to dinner, plaintiff said, "We won't go in and talk about the horse at the dinner; you must make the bargain here; will you accept £350?" The defendant said, "All right, I'll take your price." The plaintiff explained that it would be necessary to export the horse to the authorities in Vienna, and that the bargain should be confirmed by them before the sale was completed, and the horse was not actually bought until the 16th April.

When the horse arrived at Vienna, he was examined by Dr. Jaroshe, a veterinary surgeon at Chorostkow, Galicia. He found the horse suffering from inflammation of the eye, called iridio-chorisiditis recidiva equorum, commonly called moon-blindness because it recurs once a month. Cataract is a direct result of moon-blindness. Dr. Jaroshe said the disease must have existed on the 22nd March, 1910, although not perhaps visible to an ordinary man. When Jaroshe examined the horse, it was chronic; he also stated that it was an hereditary disease. As a result of this examination, which was confirmed by two Viennese experts, the horse was rejected by the Austrian authorities, and sent back

to Ireland. The defendant refused to take him back; and he was resold for £40 by auction at Sewell's, on notice to defendant.

The above evidence, given by and on behalf of the plaintiff, will be sufficient to enable the judgments to be understood on the only point with which this report is conversant, namely, the way in which the question of express warranty was submitted to the jury by the Lord Chief Justice.

It is right to add, however, that the plaintiff's account was not borne out by Mr. Keenan, who was present when the horse was inspected on the 22nd March, and was contradicted by the defendant and his stud-groom. Both the latter deposed that the horse was carefully examined by the defendant on the 23rd. Mr. Aidan Walsh was the veterinary surgeon on whose certificate the transport order was obtained. It was dated the 24th March, 1910, and was as follows:—"I have this day examined bay thoroughbred. The animal is, in my opinion, free from hereditary disease, and sound for stud purposes." A great body of expert evidence was given as to the ophthalmia. Witnesses for the defendant gave it as their opinion that it was the result of an accident, and not hereditary. All seemed agreed, however, that, from whatever cause it arose, it existed on the 22nd March, whether discernible or not.

At the close of the defendant's case, the Lord Chief Justice said that he would leave to the jury the questions:—

I. Did the defendant warrant the horse?

II. Did he assure the plaintiff that the horse was fit for stud purposes?

III. Was the defendant guilty of fraud?

Mr. Sullivan, K.C., for the defendant, asked His Lordship to leave to the jury the questions: (*a*) Did the defendant warrant the horse sound? or (*b*) Did the defendant represent the horse as sound to his knowledge? (*c*) Was the horse in fact unsound for stud purposes? (*d*) Was the horse at the time of the sale unsound to defendant's knowledge?

In the course of his charge to the jury, after referring to the question of fraud (upon which His Lordship, without directing, charged in favour of the defendant), His Lordship said, "There are two other questions that will make Mr. Reade responsible if

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they are decided against him. The first question you have to try is, Did the defendant at the time of the sale represent to the plaintiff, in order that plaintiff might purchase the horse, that the horse was fit for stud purposes? That is plain enough. Did he make any representation to him that the horse was fit for stud purposes as sound? If you believe Mr. Schawel, he did." After commenting on the evidence of Schawel, Reade, and his stud-groom, His Lordship continued, "There was direct contradiction. Which of them do you believe? . . . Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes; and did the plaintiff act upon that representation in the purchase of the horse? If the defendant did not represent it in order that the plaintiff might purchase the horse, what is the use of it at all? . . . . It is for you to say whether you will answer that question—Yes or No. Was the horse fit for stud purposes? You heard all that. If there was any hereditary disease, he is not fit for stud purposes."

The following are the questions which were left in the issue paper to the jury, and their answers to the same:—

I. Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes, and did the plaintiff act upon that representation in the purchase of the horse (1)? Answer—Yes.

II. Was the horse fit for stud purposes at the time of sale? Answer—No.

III. Was the defendant guilty of fraud? Answer—No.

IV. What damages, if any? Answer—£350.

The learned Lord Chief Justice entered judgment for the plaintiff for £350 with costs.

In his notice of motion to enter judgment for him, or for

(1) It was stated in argument that the question was put in this form at the instance of Serjeant Moriarty, K.C., but this does not appear from the shorthand writer's notes, or the report of the Lord Chief Justice.

a new trial, the defendant relied, *inter alia*, on the following grounds:—

(*d*) That the evidence established that the sale was a sale upon inspection, and subject to a veterinary surgeon's certificate, and not a sale on a warranty.

(*e*) That the representation alleged prior to the negotiations for sale was not a warranty in law.

(*g*) That the warranty (if any) would not in law apply to the defect alleged, which was discoverable by the veterinary examination, stipulated and made at plaintiff's instance.

A. M. Sullivan, K.C. (with him, *D. S. Henry, K.C.*, and *Mahony*), for the appellant:—

The question of warranty was not left to the jury, and, in the absence of their finding on it, the Court cannot decide it: *Royal Mail Steam Packet Co.* v. *George and Branday* (1). That was a decision of the Privy Council, on section 48 of the Jamaica Code of Civil Procedure analogous to the English Order XL, Rule 10, and the corresponding Irish Rule. Lord Hobhouse, in delivering the unanimous judgment of the Privy Council, followed the judgment of the Court of Appeal in *Millissich* v. *Lloyds* (2), where Mellish, L.J., said that it was never intended by the rule that questions of fact should be withdrawn from the jury; and he pointed out the danger of a Court taking upon itself the functions of a jury.

In *Jones* v. *Spenser*, in the House of Lords, a case which is only reported in 77 L. T. (N. S.) 536, Lord Herschell, in giving judgment, after referring to the rule that the verdict of a jury ought only to be set aside in very exceptional circumstances, says, at p. 538, "But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them; that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict." How can the Court be satisfied in this case that the jury intended to find that a warranty, as distinct from a mere

(1) [1900] A. C. 480. (2) 36 L. T. (N. S.) 423.

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representation, was given? I asked the Lord Chief Justice to leave to the jury the question, "Did the defendant warrant the horse sound?" and before charging the jury, His Lordship said he would do so. Serjeant Moriarty induced him to change his mind, and to substitute for the well-known and unambiguous word "warrant" the uncertain and misleading word "represent." It is absurd to say that a special jury would not understand the meaning of the terms "warrant" and "warranty," especially when accompanied by appropriate instruction from the Bench. Even if they believed the plaintiff's version of what occurred on the 22nd March, 1910, and disbelieved the evidence of the defendant and his groom, what is there to show that they thought it was anything more than a casual observation which their finding against fraud rendered unactionable? These were both business men, well accustomed to selling and buying horses. Is it conceivable that the plaintiff would accept such a statement as a warranty, and pay £350 on the faith of it, without more? But there was more. Plaintiff knew that there would be an examination by a veterinary surgeon, and that unless a certificate of soundness was given, the purchase must fall through. It is quite immaterial that this was necessary for the transport of the horse. It was a material protection which the plaintiff had in his mind all through the prolonged negotiations, and it is impossible to suppose that he did not rely on it.

His subsequent conduct is inconsistent with the hypothesis that he supposed he had a warranty. [Counsel went at considerable length through parts of the evidence to show this.]

The representation relied on here was antecedent to, and independent of, the contract. But to constitute a warranty the representation must be part of the contract of sale: *Hopkins* v. *Tanquaray* (1). Referring to the representation of soundness in that case, Jervis, C.J., said (p. 138), "I think it is quite clear that what passed amounted to a representation only, and not to a warranty." There the seller said to the purchaser, "You need not examine his legs; you have nothing to look for. I assure you he is perfectly sound in every respect"; and the purchaser

(1) 15 C. B. 130.

replied, "If you say so, I am satisfied," and bought the horse the next day at an auction: see Selwyn, N.P., 13th ed. 565; *Chandelor* v. *Lopus* (1); *Salmon* v. *Ward* (2). In Benjamin on Sales (4th Ed.), p. 607, a warranty is defined as "a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied." This definition is in substance the same as that given by Martin, B., in *Stucley* v. *Bailey* (3), quoting from Lord Abinger's judgment in *Chanter* v. *Hopkins* (4). The representation to be a warranty must be part of the contract: *per* Jervis, C.J., *Hopkins* v. *Tanquaray* (5). [Counsel also cited *Jones* v. *Just* (6); *Wilson* v. *Dunville* (7); *Wallis* v. *Russell* (8).]

Serjeant Moriarty, K.C., and *James O'Connor, K.C.* (with them *J. P. Kenny*), for the plaintiff.

The Lord Chief Justice's charge and the first question he left to the jury were perfectly right in accordance with settled authority, and the jury's answer to that question concluded the case. It is elementary law that a warranty may be given, though neither the word "warrant" nor "warranty" is used. Here, if the plaintiff was telling the truth (and the jury believed him) a clear assertion of soundness was made by the defendant on the 22nd March that was never withdrawn or qualified. Why was it made, but to induce the plaintiff to act upon it? And the plaintiff did act upon it. It was known to both parties that the horse was wanted for a stud. A more perfect and complete warranty can scarcely be imagined. Again, how can it be said that it was not part of the contract, when the contract was concluded on the basis of its truth? It was really a question of veracity which side the jury believed.

In *Bannerman* v. *White* (9), on the sale of hops the seller gave the buyer the following guarantee: "I guarantee Messrs. W. against any loss by my 1860 hops through the mode of treatment on the poles or curing, and hold myself liable to pay them

(1) 2 Sm. L. C., 11th ed. 54.
(2) 2 C. & P. 211.
(3) 1 H. & C. 405, at p. 415.
(4) 4 M. & W. 404.
(5) 15 C. B., at p. 138.
(6) L. R. 3 Q. B. 197.
(7) 4 L. R. I. 249.
(8) [1902] 2 I. R. 585, 599.
(9) 10 C. B. (N. S.) 844.

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any damage caused them thereby." Before the sale the sellers had told the buyers that no sulphur had been used in the cultivation of the hops. On this Erle, C.J., left to the jury the question whether the statement that no sulphur had been used in the growth of the hops was understood and intended by the parties to be a part of the contract, and a warranty to that effect, which they answered in the affirmative. On the new trial motion Erle, C.J., delivering the judgment of the Court (the other members of which were Williams, Willes, and Byles, JJ.), said (p. 860), "We avoid the term 'warranty' because it is used in two senses, and the term 'condition' because the question is whether that term is applicable. Then the effect is that the defendants" (the purchasers) "required, and the plaintiff" (the seller) "gave, his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted: and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be null, if the warranty is broken." And the Court there held the contract null.

In *De Lassalle* v. *Guilford* (1) A. L. Smith, M.R., said (p. 221), "In determining whether it" (the previous affirmation relied on) "was so intended, *i.e.*, to be a warranty, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not: see Benjamin on Sales, 3rd ed., 607, whose statement upon the law, in my judgment, is accurate, that the above constitutes a warranty upon the sale of a chattel": see also *Paquin* v. *Beauclerk* (2); *Hart* v. *Lord Newry* (3); *Chanter* v. *Hopkins* (4).

(1) [1901] 2 K. B. 215.
(2) [1906] A. C. 148.
(3) 1 L. J. K. B. (O. S.), 237.
(4) 4 M. & W. 399.

In *Cave* v. *Coleman* (1), in the course of conversation at the dealing for the purchase of a horse, the seller said to the purchaser, "You may depend upon it that the horse is perfectly quiet and free from vice." The bargain was afterwards struck without any further warranty, by parol or in writing. It was held that this was a warranty, and the purchaser having obtained a verdict at the trial, the Court in *banc* refused a rule *nisi*. Lord Tenterden, C.J., said, "I think it clear that the proof of warranty was sufficient to support the declaration. The parties are dealing and the seller says, 'You may depend upon it that the horse is perfectly quiet and free from vice.' That is a very sufficient warranty, though the word *warrant* was not used."

In *Stucley* v. *Bailey* (2) the Judge at the trial held that the letters relied on constituted a warranty, and rejected evidence tendered by the defendant to show that they did not amount to a warranty. The Court in *banc* held that he was wrong in this—that the evidence tendered should have been admitted, and the whole case left to the jury. That is exactly what was done here. The question whether a statement is a mere expression of opinion or is a warranty is one for the jury: *Power* v. *Barham* (3), a very extreme case, where the jury found that a bill of parcels and receipts containing the words "Four pictures, Views in Venice, Canaletto," was a warranty—a finding that Littledale, J., said would be very alarming to auctioneers.

THE LORD CHANCELLOR:—

This case has been very fully argued. We have considered it not merely during the discussion in Court, but had the opportunity of doing so as well during the adjournment, and we find ourselves now prepared to dispose of it.

The plaintiff's case was presented at the trial on three grounds. First, on an alleged express warranty that the horse sold was sound, and fit for stud purposes; secondly, on an implied condition or warranty to the same effect arising under section 14 of the Sale of Goods Act, 1893; and thirdly, on the allegation of a fraudulent misrepresentation on the part of the defendant. A considerable number of witnesses were examined in support of the plaintiff's

(1) 3 Man. & Ryl. 2.
(2) 1 H. & C. 405.
(3) 4 A. & E. 473.

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various contentions, and especially in respect of the liability that was said to exist on the defendant's side in virtue of his business as a horse dealer, and of the plaintiff's previous dealings with him in the purchase of horses over a period of several years. In the result, however, no question relating to section 14 of the Act of 1893 was laid before the jury.

Immediately before his charge to the jury the Lord Chief Justice, before whom the case was tried, announced that he intended to put the questions shown in the report, raising the issue of an express warranty made by the defendant on the sale of the stallion, of the animal's fitness for the stud, and of the fraudulent misrepresentation attributed to the defendant, to the effect that he deceitfully described the horse as being sound, knowing the fact to be to the contrary. Mr. Sullivan, K.C., for the defendant, not merely agreed but urged that the question of an express warranty should be submitted, but Serjeant Moriarty, K.C., the leading counsel of the defendant, objected to the question on the subject of warranty proposed by the learned Judge, and, as I understand, advanced the view that the jury might be puzzled by the word "warrant" in the question contemplated by the Lord Chief Justice. It is not easy to understand on what the Serjeant's apprehension in that respect was founded, but whatever it was, in the result the learned Judge accepted the suggestion of the Serjeant, and accordingly framed the question in the form on which the verdict was found. The jury exculpated the defendant from the imputation of fraud, but they found that, in fact, the representation recited in the first question put was made by the defendant. There was no finding of warranty by the jury, nor any determination by them that the representation mentioned in question No. 1 formed any part of the contract of sale. It is impossible for me to accept the view that the jury could not understand the meaning of a simple question founded on warranty, and so expressed, and having considered the actual questions submitted in the circumstances of the case, with the variety of questions raised, intermingled with one another, I am unable to accept the contention that the first question in fact meant a warranty, or that the jury did more than apply their minds to the consideration whether or not the statement relied on was in fact made by the defendant. The incident itself took place on March 22nd, and we know

that the purchase was not decided on by the defendant, and the sale effected, till a later date. There is, in my opinion, nothing in the jury's answers to indicate that they intended to decide that the representation was incorporated, or was intended to be incorporated, in the contract of sale, or that their minds were at all directed to that inquiry. On that view of what occurred it is impossible for me not to adopt the argument of the appellant, that the trial in this respect was a miscarriage, and that the actual finding of the jury on question No. 1 was inadequate to support the judgment entered for the plaintiff. The law indicating the duty of the Court in these conditions is authoritatively laid down in *Jones* v. *Spencer* (1). That, too, was an action for the breach of warranty of a horse. The following is the head-note:—"Where a question of fact is left to the jury, and they have answered it reasonably, their verdict cannot be disturbed. But where the verdict is one that would not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, or if the Court is not satisfied that the real question to be determined was so left to them that their verdict was given upon the determination of that question, the Court may set aside the verdict, and order a new trial." The Lord Chancellor (Lord Halsbury), at p. 537, states his view emphatically to that effect. The trial, in the particular case, was held to have been unsatisfactory, and the decision of the Court of Appeal, refusing a new trial, was reversed. Lord Herschell, in the same case, said:—"I think that the hesitation of a Court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, where that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts in the case and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of

(1) 77 L. T. (N. S.), p. 536.

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that question give their verdict." The essential point in respect of the alleged warranty depended on the view, whether or not the representation was part of the contract of sale; and, as I have said already, I find it impossible to conclude that the jury did in fact determine that question, or that they applied their minds to it, or gave a verdict upon it. So far I am in agreement with the judgment of the Divisional Court, from which the present appeal has been taken. As I understand the judgment of the Lord Chief Baron, who presided on the occasion, he and the other members of the Court were all of opinion that question No. 1 in the present case, and the answer to it, were not a definite or adequate finding of a warranty. He pointed out that it was elementary law that to render an affirmation a warranty it must be intended to be part of the contract. He, moreover, pointed out what I have already adverted to, namely, the fact that counsel for the plaintiff asked to have the question put in a form which he says was, in his opinion, insufficient, and which omitted the important matter of the statement being part of the contract. He added that the requisition to that effect was probably the *fons et origo* of the omission. I think there can be little doubt on the subject, but the fact that there was an omission, and one on an essential point, is undisputed by the Lord Chief Baron, and by Mr. Justice Gibson and Mr. Justice Boyd, who concurred in the judgment. In that state of affairs I cannot but think that the trial was unsatisfactory; and, as I infer, the Divisional Court must have necessarily held the same view. But at this point arises the difference of view between this Court and the Divisional Court. The Lord Chief Baron says:—"As it is, I feel myself bound, having regard to the course of the trial, to infer under Order XL, Rule 9, from the findings of the jury, that the representation was part of the contract." I refrain from dealing in any way with the opinion so expressed, but the question raised in the appeal before us relates to the jurisdiction of the Divisional Court to arrive at, and declare, any such decision on what it is admitted is the vital question involved in a plea of warranty, in order to supply a defect and omission in the issues submitted to the jury at the trial. It was insisted too that this was not a case of carelessness and oversight, but the result of the deliberate intervention made for his own good reasons by the learned counsel for the plaintiff. The rule on which the Divisional

Court acted is, no doubt, far-reaching in its language, but if stretched to its full limit it would enable a Court in a great measure to supersede the functions of a jury. I am not certain whether or not the case of *The Royal Mail Steam Packet Company, Appellants*; *George and Branday, Respondents* (1) was cited before the learned Judges in the other Court. I am disposed to think it was not, for no reference was made to it in the Lord Chief Baron's judgment as reported. But it appears to negative the jurisdiction that was assumed by the Divisional Court to exist under Order XL, Rule 9. The question in the case indicated had reference to the power of the Court in Jamaica under the Code of Civil Procedure in that country, section 438, to decide questions of fact not submitted to the jury. The Jamaica section corresponds with the English Rule, Order XL, Rule 10, and in turn with the Irish Rule already mentioned, which is in precisely the same terms. Lord Hobhouse deals with the subject, pp. 493–4. He dismisses the argument that the findings of the Court were not inconsistent with the findings of the jury, and refers to the fact that the Court of Appeal had relied on the rule referred to, Lord Hobhouse quoting from *Millissich* v. *Lloyds* (2), where the matter was, he said, carefully considered. In that case, Mellish, L.J., said that, though the words were very general, "it was clearly not intended by the Legislature that the Court should take advantage of that General Rule to take away questions from the consideration of the jury which are questions of fact properly for their consideration.' Lord Hobhouse added that it was argued that the evidence was all one way, and that a new trial would be useless. But it was answered that the jury are the judges of the credibility of witnesses, and also of the general inference to be drawn from all the facts. In view of that authority, I cannot escape the conclusion that it was beyond the jurisdiction of the Divisional Court to make the decision it did on a question in the opinion of the Court admittedly essential, and declared by it to be proper for submission to the jury, namely, whether or not the representation relied on was intended to be, and was, in fact, part of the contract between the plaintiff and the defendant. The appeal, accordingly, should, in our judgment, be allowed.

(1) [1900] A. C. 480. (2) 36 L. T. (N. S.) 423.

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HOLMES, L.J. :—

The plaintiff's case was presented in the statement of claim in three aspects—(1) Breach of an express warranty that the horse sold was sound for stud purposes; (2) breach of an implied warranty to the same effect; and (3) fraudulent representation of a like character.

At the close of the defendant's case there was evidence before the jury from which, if appropriate questions had been put to them, there might have been a verdict for the plaintiff on either the first or third cause of action, although it was unlikely that the issue of fraud would have been found against the defendant. It is somewhat difficult to understand how the questions left to the jury were given their final shape. The Lord Chief Justice said that he would leave the question of express warranty to the jury; and if this had been done, accompanied with an explanation of what amounts in law to a warranty, the result might have been perfectly satisfactory. But counsel for the plaintiff seemed to be opposed to this course; and, while submitting certain questions relevant to an implied warranty, did not ask for a finding as to express warranty.

I have no doubt that the Judge did not intend to withdraw the last-mentioned issue from the jury; and yet, although requested by the defendant's counsel to submit it, this was not done.

The questions framed by the Lord Chief Justice, and the answers thereto, have been read repeatedly during the argument; and I have been obliged to come to the conclusion—agreeing in this respect with the Divisional Court—that they were not sufficient to try what I regard as the matter on which the result of the action depends. The evidence to which Lord O'Brien directed the attention of the jury in his charge as supporting the affirmative of his first question was the observation of the defendant, deposed to by the plaintiff when the latter began to examine "Mallow Man." It was I think, the only thing alleged by any witness to have been said by the defendant that could have amounted to an express warranty of soundness; and I assume that the jury found that he used the words. That was

the first step towards a verdict of express warranty, but as far as I can see it was the only step taken, and it was not sufficient without something more.

The legal characteristic of a warranty on the sale of an animal or other chattel is an undertaking or assurance incorporated with the contract of sale by agreement of the parties, express or implied. It must be intended by the seller, and accepted by the buyer, as a term of the contract. I should think that, as a rule, when a thoroughbred stallion is sold for the stud at the price of £350, there would be no difficulty in ascertaining whether there was a warranty of soundness accompanying the sale. Such a warranty, if it was wanted, would be definitely asked for, and as definitely given or refused. But nothing of this kind happened when the "Mallow Man" was sold. If there was a warranty, it was given voluntarily in a casual sentence or two, and never referred to again in the three interviews that ended in the purchase.

Whether these sentences were made by agreement a term of the contract is an inference to be drawn from all the circumstances of the case; and I cannot find in the form of the questions, in the answers thereto, or in Lord O'Brien's charge, anything to show that this branch of the case engaged the attention of the jury—and yet there were several topics in connexion with it worthy of consideration. The plaintiff is an Austrian gentleman who has spent for fifty years the hunting season in Ireland, and has great knowledge of horses and horse-dealers. He has bought on several occasions horses from the defendant, and never asked for or was given a warranty. When "Mallow Man" and those other stallions were shown to him, he proceeded to examine them, and does not appear to have made any inquiry that would lead to the seller engaging the soundness of any of them. When the defendant made the statement relied on, the plaintiff offered no comment thereon, but went on with his examination, which was adjourned to the next morning, and was then continued. In his former dealings with the defendant he had not the animals certified by a veterinary surgeon; but on this occasion he intended to require an expert's certificate of soundness as a condition precedent to the purchase; and it is a matter of

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common knowledge that such a certificate is not required when there is an express warranty. But the strongest circumstance against the plaintiff's case is his apparent ignorance that an undertaking of the soundness of the animal was part of the contract. His letter to Mr. M'Kinney, dwelling as it does on the veterinary certificate, shows that the idea of the defendant having given him an engagement had never entered his mind; and yet it was a necessary condition to the existence of such an engagement that both parties had agreed to it. This ignorance seems to have continued, as there is no reference to a warranty in the letter of the solicitor of the plaintiff that preceded the action; and even when giving his evidence, he seems to me to convey that he trusted to the defendant's general character and honesty, and not to any express assurance regarding this particular horse.

For these reasons, I am of opinion that the jury have not found that there was an express warranty of soundness; and I understand that this was also the view taken by the Divisional Court, which, however, held that it was at liberty, under the Rule on this subject, to draw as an inference of fact from all the evidence that the defendant gave a warranty of soundness, and, drawing this inference, affirmed the judgment for the plaintiff given by the Lord Chief Justice.

I have never known the Rule in question applied in such a case as this; and I think it is not applicable thereto. The allegation of express warranty was, in my opinion, the critical question in the case, and was one to be decided by the jury. If it had been found in favour of the plaintiff, I should hold that it could not be set aside; but I should also hold that a verdict the other way would have been equally binding. The true solution in such a case is a new trial; and I join the more readily in a judgment therefor, as in the present state of my knowledge I should be far from sure of what would be my own inference of fact.

CHERRY, L.J.:—

I concur. A warranty in law is essentially different from a representation. It necessarily implies, when given as to soundness, an absolute guarantee against defects, whether known to the

vendor or not. It is, in the words of Lord Abinger, "an express or implied statement of some things which the party undertakes shall be part of the contract." (1) On the other hand, a mere representation, not amounting to a warranty, is no part of the contract; and if it turn out to be incorrect, is not actionable as a general rule unless it has been made with a knowledge of its untruth. Whether there was or was not a warranty in the present case does not appear to have been submitted to the jury, or found one way or the other by them. Upon the actual findings of the jury upon the question submitted to them I rather think that the defendant, and not the plaintiff, would be entitled to judgment, if judgment were entered at all.

Under these circumstances, I think that it would be very unsatisfactory for the Court to draw an inference of fact on a question of such importance as warranty, which, in my opinion, should have been left to the jury; and I agree that there ought to be a new trial of the action.

W. G.

The plaintiff appealed to the House of Lords (2).

Serjeant Moriarty, *K.C.*, and *J. P. Kenny*, for the appellant.

A. M. Sullivan, *K.C.*, and *Mahony*, for the respondent.

LORD MACNAGHTEN:—

My Lords—This case has been a rather prolonged one, but I think it lies within a very narrow compass. The question relates to the soundness of a horse. An Austrian gentleman, of some position, was buying horses for the Austrian Government. He bought a horse from Mr. Reade. The horse was not fit for the purposes for which he bought it. His allegation was that he had a warranty, either express or implied. He desired to return the horse to Mr. Reade. Mr. Reade would not have it back; it was put up for sale, and sold for a small price, and he brought this action and recovered as damages the price which he paid for the horse.

(1) *Chanter* v. *Hopkins*, 4 M. & W., at p. 404.

(2) Before LORDS MACNAGHTEN, ATKINSON, and MOULTON. The judgments are printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

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Lord Macnaghten

My Lords, the question really is, was there a warranty either express or implied? I leave out the question of fraud, because it has been dealt with, and disposed of. Now, what Mr. Schawel says himself is this. He is asked to tell the jury:—"What happened when you were at the defendant's place on the afternoon of March 22nd?" (A.) "The horses were pulled out; I think there were four. Two were sent away at once, for I did not care for them. We looked at the remaining two, 'Mallow Man' and a chestnut horse. A little later I said I did not want the chestnut. The chestnut was sent away, and 'Mallow Man' was left there alone." (Q.) "Tell the jury what you said to the defendant, and what the defendant said to you." (A.) "When this horse stood there, I walked up to him, and looked at him. Mr. Reade said, 'You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I should tell you.' That was all." My Lords, I must say, speaking for myself, that is about as plain a warranty of the soundness of the horse as could be given.

Then, my Lords, after three days' trial, the jury evidently being very much in favour of the plaintiff, and not altogether believing the defendant, the summing up was very short. The Lord Chief Justice seems to have been desirous in the first instance to clear away the question of fraud, in order that no implication of fraud might rest upon Mr. Reade: possibly he had forgotten what he had said, and he was not intentionally telling stories. There was some question as regards the form of the question to be left to the jury, and, although it does not so appear from the shorthand notes submitted to the House, it seems to be admitted that the ultimate form of the question that was to be left to the jury was settled before the Lord Chief Justice's charge. The Lord Chief Justice says that he would deal with the question very shortly, and he disposes of the question of fraud—at least he says he should hesitate before he charged fraud against the defendant, and he adds: "That is no direction in point of law; it is merely an observation for you to go upon if you wish. I do not force my observations upon you." Then he says: "There are two other questions that will make Mr. Reade responsible if they are established against him. The first question you have to

try is: Did the defendant, at the time of the sale, represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes? That is plain enough. Did he make any representation to him that the horse was fit for stud purposes, as sound? If you believe Schawel, he did." Then His Lordship goes on a little lower down, "It is really a question of credit." Then again he says: "First look around and see what you think you ought to believe. Mr. Schawel says he walked up to the horse and looked at him, and that Mr. Reade said, 'You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I should tell you.' You heard all that. Did he invent that?" Then he goes on: "This is the question for you—Did the defendant at the time of the sale represent to the plaintiff that the horse was sound? The defendant wanted to sell the horse. Did the plaintiff act on the defendant's representation in the sale of the horse? Did he cease examining the horse? He looked at his height, but he did not examine his eyes. We can all throw our eyes over a horse, but we do not examine him like a vet. It is for you to say whether you will answer that first question, Yes or No. Was the horse fit for stud purposes? You heard all that." I think there is no question about that now.

Then coming to the actual form of the questions, the first question—and this is really the material question—is, "Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes, and did the plaintiff act upon that representation in the purchase of the horse?" Now, the word "warranty" does not appear in that question, but that seems to me to contain all the elements of warranty. The real question put to the jury was—and I think that both parties were agreed upon that—Did the defendant warrant the horse or not? Taking what he said there, if the jury believed it, as unquestionably they did—and the Chief Justice said he believed every word that Mr. Schawel said—was that a warranty express or implied? In my opinion, my Lords, it is a clear and express warranty. It was done for the purpose of the sale, and the plaintiff acted upon it; that was put to the jury, and they so found.

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I am therefore of opinion that the learned Judges of the Court of Appeal were wrong in reversing the order of the Divisional Court; and I move your Lordships that the appeal should be allowed, and the order of the Divisional Court should be restored with costs.

LORD ATKINSON:—

My Lords, I concur.

I think it is perfectly clear that of the three questions left to the jury, question No. 1, does not deal with fraud at all. The only other issue in the case was warranty. It would appear to me that the Lord Chief Justice, unfortunately as it now appears, was induced, on the solicitation or on the objection of Mr. Serjeant Moriarty, to change the bare question which he proposed to leave to the jury, namely, Is this a warranty? into the form in which he left it; but what he meant to do was to embody in this question, which he actually left to the jury, the different elements which constitute and create a warranty.

Now, the jury have found that the representation was made, that is, that the defendant said to the plaintiff, "You need not look at the horse; he is perfectly sound. If he was not, I should have told you." They have also found that the plaintiff relied upon that, and ceased his examination; and they have found that that statement was made for the purpose of the sale. If one takes that last expression, "for the purpose of the sale," and looks back to the summing up of the learned Lord Chief Justice, I think it is perfectly plain that the jury must have understood that that was part of the transaction, and meant to be the basis of the sale. If that was the intention of the man who made the statement, and if the person to whom it was addressed acted upon it, then that constitutes a warranty. A statement is made, it is acted upon, and it is made by the person who makes it for the purpose of the sale, that is, with the intention of bringing about the sale. I do not know what other ingredient is necessary to create a warranty, and, therefore, I think in effect, though not in form, the jury have found that there was a warranty; and that they must have understood the main points in the controversy is evident. The case, to a great degree, I think, if not entirely, went upon the

question as to which of the two accounts was true—whether the account of the plaintiff was true, or whether the account of the defendant was true, and it seems to have been conducted really upon the assumption that that question would determine the whole action. I, therefore, concur with the opinion that my noble and learned friend has expressed, that the judgment of the Court of Appeal was erroneous; that the judgment of the Divisional Court was right, and that the judgment of the Court of Appeal should be reversed, and that of the Divisional Court restored.

LORD MOULTON:—

My Lords, I concur.

I am of opinion that, by their answer to the first question, the jury have found an express warranty that the horse was sound. I do not think, nor do I believe, it would be contended that as an abstract question the elements which constitute a warranty are accurately set forth in the form of the first question so as to be applicable to every case. But if you apply the terms of that question to the facts of the present case, it seems to me that the finding is an express and thoroughly justified finding of an express warranty in the most absolute form.

As the noble and learned Lord who has last addressed the House has pointed out, the contest between the parties at the end was practically a contest as to which of two tales should be believed. The plaintiff had given his account of what was said, and the defendant had given his account; and I think there is no doubt whatever that by their verdict the jury showed that they accepted the plaintiff's account. Now, if they did, there was no alternative but they must find that the representation was that which the plaintiff had said it was; and therefore, I read to myself this answer of the jury to the first question in connexion with the actual representation, and I find that they say that the defendant at the time of the sale said to the plaintiff, "You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I should tell you"—that he said that in order that the plaintiff might purchase the horse, and that the plaintiff acted upon that representation, and desisted from

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his personal examination of that horse. That is what in this case the answer to the question put by the Lord Chief Justice amounts to.

Now, it would be impossible, in my mind, to have a clearer example of an express warranty where the word "warrant" was not used. The essence of such warranty is that it becomes plain by the words, and the action, of the parties that it is intended that in the purchase the responsibility of the soundness shall rest upon the vendor; and how in the world could a vendor more clearly indicate that he is prepared and intends to take upon himself the responsibility of the soundness than by saying, "You need not look at that horse, because it is perfectly sound," and sees that the purchaser thereupon desists from his immediate independent examination?

My Lords, it seems to me, as found by the jury in their answer to the first question, we have clearly and unmistakably all the elements of an express warranty; and on this ground I concur in the motion that is before the House, that the order of the Court of Appeal should be discharged, and the order of the Court below restored.

Questions put:—That the Order appealed from be reversed. *The Contents have it.*

That the appeal be allowed with costs here and below. *The Contents have it.*

Solicitor for the plaintiff: *T. J. Farley*; Agent: *G. Gavan Duffy.*

Solicitors for the defendant: *O'Connor & Dudley*; Agents: *Beveridge, Greig, & Co.*

DAVIDSON *v.* THE COUNCIL OF THE COUNTY BOROUGH OF BELFAST (1).

K. B. Div.
1912.
Nov. 26.

Civil-bill appeal—Belfast Improvement Act, 1878 (41 & 42 *Vict. c.* clxxx), *s.* 97—*Belfast Corporation Act*, 1911 (1 & 2 *Geo. 5, c.* cxc), *s.* 102—45 & 46 *Vict. c.* 29, *s.* 4.

An appeal does not lie to the Judge of Assize from an order of the Recorder of Belfast, made under section 97 of the Belfast Improvement Act, 1878, as amended by section 102 of the Belfast Corporation Act, 1911, declaring that an order of the Council of the County Borough of Belfast requiring an adjoining owner to contribute toward the expense of completing a street, is unjust and unfair.

CASE STATED by Dodd, J., on the hearing of a civil-bill appeal, from which the following facts are taken :—

Mrs. Elizabeth M. Davidson was owner as tenant for life of certain lands adjoining a back street situated on the west side of Oakland Avenue in the county of the City of Belfast.

By order of the Council of the County Borough of Belfast, made on the 1st April, 1912, under the provisions of setions 86, 87, 88, 89, and 90 of the County Antrim and Belfast Borough Act, 1865 (28 & 29 Vict. Sess., 1865, c. 183), as amended by section 23 of the Belfast Borough Act, 1868 (31 & 32 Vict. c. 117), and section 115 of the Belfast Improvement Act, 1878, it was ordered that the aforesaid back street should within one month from the 1st May, 1912, be freed from all obstructions, sewered, drained, levelled, paved, and otherwise completed in accordance with the specifications prepared by the city surveyor, and that (*inter alia*) Mrs. Elizabeth M. Davidson should contribute towards the expenses of such works the sum of £118 5*s.* 8*d.*

By notice in writing, dated the 19th April, 1912, Mrs. Elizabeth M. Davidson, in accordance with section 97 of the Belfast Improvement Act, 1878, appealed to the Recorder of Belfast against this order on the ground (*inter alia*) that the same was unjust and unfair; and by order made in pursuance of that section on the

(1) Before PALLES, C.B., and GIBSON, J.

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hearing of such appeal the Recorder decided that the order of the 1st April, 1912, was unjust and unfair as regards Mrs. Davidson.

On the 6th July, 1912, the Council of the County Borough of Belfast served on Mrs. Davidson a notice in writing, dated the 6th July, stating that they appealed against the judgment of the Recorder to the next going Judge of Assize for the county of the City of Belfast. The Clerk of the Crown and Peace having declined to list the appeal on the ground that no appeal lay in such matter, counsel on behalf of the Council of the County Borough of Belfast applied at the calling over of the list of civil-bill appeals that the appeal should be listed, in order that the question should be argued as to whether such appeal lay; and Dodd, J., listed the appeal provisionally for the purpose of such argument.

After hearing counsel on both sides, Dodd, J., stated the present case, the question for the decision of this Court being :— "Does an appeal lie to the going Judge of Assize in for and the County of the City of Belfast from an order made in pursuance of the aforesaid section 97 of the Belfast Improvement Act, 1878?"

Thomas Harrison (with him *Gordon, K.C.*), for the County Council of the County Borough of Belfast :—

Section 97 of the Belfast Improvement Act, 1878, had given a right of appeal to the Quarter Sessions from an order of the Corporation imposing liability to street expenses. By section 102 of the Belfast Corporation Act, 1911, the Recorder of Belfast is substituted for Quarter Sessions. Accordingly, section 4 of 45 & 46 Vict. c. 29, applies so as so give a right of appeal from the order of the Recorder to the Judge of Assize. It could never have been the intention of the Legislature to allow appeals in cases which involved only a few shillings, and to give no appeal from an order where the amount involved might be £1000.

R. F. Harrison, K.C., and *Herbert Thompson*, for Mrs. Davidson, were not called on.

THE COURT answered the question in the negative.

Solicitor for the Council of the County Borough of Belfast: *A. J. Lewis.*

Solicitors for Mrs. Davidson: *Shean & Dickson.* J. G. T.

THE CLARE COUNTY COUNCIL *v.* WILLIAM WILSON, DAVID WILSON, AND ADAM WILSON, TRADING AS ADAM WILSON AND SONS (1).

K. B. Div. 1912. Nov. 22, 29.

Appeal. 1912. Dec. 9, 17.

(1912. No. 12174.)

Public road—Repair—Excessive user of road—Public Roads (Ireland) Act, 1911 (1 & 2 *Geo.* 5, *c.* 45)—*Action for expenses caused by excessive user—Nature of action—Service out of the jurisdiction—Order XI, Rule* 1.

An action brought by a County Council or an Urban District Council under the Public Roads (Ireland) Act, 1911, to recover extraordinary expenses necessary for repairing roads by reason of damage caused by excessive user of the roads from the person liable under the said Act to recoup such expenses, is not within any of the classes of action enumerated in Order XI, Rule 1, and consequently where the person sought to be charged in an intended action under the said Act is resident out of the jurisdiction, leave of the Court to issue and serve a writ of summons out of the jurisdiction will not be allowed. So held by Holmes and Cherry, L.JJ., affirming the decision of the King's Bench Division, *diss.* the Lord Chancellor.

MOTION ON NOTICE.

The writ of summons in this intended action was indorsed with a claim for £469, being the amount of extraordinary expenses alleged to have become necessary and to have been incurred by the plaintiffs for the purpose of repairing certain roads in the county of Clare, by reason of the damage caused to the said roads by excessive weight passing along the same, and extraordinary traffic thereon occasioned by large quantities of timber being carried along the said roads on carts and traction-engines, by and in consequence of the orders of the defendants to their servants, agents, and employees (2).

(1) In the King's Bench Division before MADDEN and WRIGHT, JJ.

(2) The first section of the Public Roads (Ireland) Act, 1911 (1 & 2 Geo. 5, c. 45), enacts that:—

"Where, by a certificate of their surveyor, it appears to the county council or urban district council which is liable or has undertaken to repair any public road, whether a main road or not, that, having regard to the average expense

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The plaintiffs, on the 30th October, 1912, applied *ex parte* to the King's Bench Division for an order under Order XI, Rule 1, for liberty to issue the said writ for service out of the jurisdiction upon the defendants who resided in Scotland (1).

The Court made no rule on the said motion.

On the 31st October, 1912, the plaintiffs applied *ex parte* to the Court of Appeal by way of appeal from the said order of the 30th October; whereupon the Court of Appeal discharged the latter order, and gave liberty to the plaintiffs to issue the said writ, and serve the same upon the defendants out of the jurisdiction, all further proceedings in the action, save the issuing and service of the writ, and the entering of appearances thereto, being stayed for one month from the date of the issue of the writ, to enable the defendants, if so advised, to show cause against this order.

The defendants, who had entered a conditional appearance to the writ, now applied for an order that the writ issued and served outside the jurisdiction of the Court, pursuant to the said order of the Court of Appeal, be set aside, on the ground that the indorsement thereon disclosed no cause of action in respect of

of repairing that road, extraordinary expenses have become necessary for the purpose of repairing the road by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, the council may recover from any person by or in consequence of whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have become necessary by reason of the damage arising from such weight or traffic as aforesaid."

The application was grounded on the affidavit of plaintiffs' county surveyor, who alleged that the defendants, in or about the month of November, 1909, bought certain timber plantations in the county of Clare, and proceeded to cut down the timber, and convey the same by road to Limerick for transhipment to Scotland, and continued this traffic from the month of November, 1909, to in or about the end of the month of May, 1912; that owing to the excessive weight of the timber passing along the said roads, and the extraordinary traffic resulting therefrom, the extraordinary expenses appearing on the certificate annexed to the said affidavit were incurred; and that as the plaintiffs' necessary witnesses resided in the county of Clare, and an inspection of the roads in question by the jury might become necessary, the proceedings in the intended action could be most conveniently had in Ireland.

which the Court had jurisdiction to order that a writ of summons should issue for service, or be served, outside the jurisdiction.

Phelps, for the defendants.

P. Lynch, *K.C.*, and *M. Comyn*, for the plaintiffs.

The arguments were similar to those in the Court of Appeal, reported *infra*.

MADDEN, J.:— Nov. 29.

By the writ of summons in this action the plaintiffs seek to recover the sum of £464, the amount of extraordinary expenses incurred by them for the purpose of repairing certain roads in the county of Clare, in consequence of damages caused to these roads by excessive weight and extraordinary traffic passing over the roads. This excessive weight and extraordinary traffic were occasioned by the carriage over the roads of large quantities of timber in carts and traction-engines.

The plaintiffs' cause of action arises under the provisions of the 1st section of 1 & 2 Geo. 5, c. 45, the Public Roads (Ireland) Act, 1911, which is as follows:—

[His lordship read the section, and continued.]

This section applies to Ireland the provisions of the 23rd section of the Highways and Locomotives (Amendment) Act, 1898, as amended by 61 & 62 Vict. c. 29.

The provisions of the English Statutes have been the subject of judicial decision in several cases. In *Hill* v. *Thomas* (1) before the English Court of Appeal, the question for decision was the meaning of the expression "extraordinary traffic." Bowen, L.J., thus explains the general scope of the legislation: "We may begin by observing that the object of the section is not to prohibit extraordinary traffic, but to levy the extra expense of damage done by such traffic to the road on the right shoulders, namely, upon those who caused the damage, and to whose benefit it enured."

The result of the cases is thus stated in the Encyclopædia of English Law, Title "Highways," at p. 563: "It sometimes happens that a particular person uses the highway in an extra-

(1) [1893] 2 Q. B. 333.

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ordinary manner, or to an unusual degree; and though such user may be not unlawful, nor a nuisance, still it may put an unfair strain on the metalling of the road, and cause an undue amount of damage. It was felt that such a person ought to make a special contribution to the funds of the highway authority."

User of the road by the extraordinary traffic to which the section applies would be unlawful if it were to result in the creation of a public nuisance, which could be the subject of indictment, or of an action at law at the suit of a person who had suffered special damage as the result of the nuisance. But neither of these processes, which were seldom resorted to, would result in compensation to the ratepayers; and serious damage was being caused to the surface of the roads, especially since the introduction of traction-engines, which fell short of the creation of a public nuisance.

The statute does not make the user of a public road in an extraordinary manner as to weight or traffic unlawful. The user may or may not be lawful, according to the circumstances of the case, but, independently of the question of legality, the person so using the roads is placed under a statutory liability to recoup the locality.

The present action is brought to enforce this statutory liability against the defendants, who have no place of business in Ireland, carrying on business under the name of Adam Wilson & Sons, in Aughinlech, Scotland.

With a view to the bringing of the present action, an application was made to my brother Wright, sitting to hear *ex-parte* motions, on behalf of the Clare County Council, as intended plaintiffs, for an order under Order XI, Rule 1, for liberty to issue and serve out of the jurisdiction a writ claiming the amount certified by the county surveyor as the increased expenditure caused by this extraordinary traffic. The application was placed in the list of motions for argument, and this Court, consisting of my brothers Kenny and Wright and myself, made no rule on the motion. It appeared to us that the intended action was not included in any of the classes of proceedings to which the General Order is applicable. It was argued that the language of sub-clause (*f*) was wide enough to include it. But it appeared to

us that this sub-clause was conversant only with actions which were founded on some contract, express or implied. We were of opinion that the intended action was not referable to contract, but rather sounded in tort, and that it was not within the provisions of Order XI, which was framed before this action had come into existence. The intended defendants were not using the highway under any contract which could be regarded as affected by the proposed action, but were using it in exercise of their common-law right as members of the public, in such a manner as rendered them liable to compensate the locality for injury to the highway as a consequence of this user.

The application came before the Court of Appeal *ex parte*, and on the 31st of October the Court discharged the order of this Court, and made an order for the issue of the writ in the intended action, with liberty to serve it out of the jurisdiction. It was also ordered that all further proceedings in the action, save the issue of the writ, should be stayed for a month, to enable the defendants, if so advised, to come in and show cause why the order should not have been made. By this order the Court of Appeal, without prejudging the question of the application of Order XI, provided a means by which an important legal question, going to the root of the validity of proceedings that might be protracted and expensive, should be decided at the outset after argument on both sides.

The case is now before us for decision upon cause shown by the defendants under the order of the Court of Appeal. On the argument we were referred to the decisions on the corresponding English Statute, and, amongst others, to a decision of the Court of Queen's Bench in *Story* v. *Sheard* (1). The question in that case was whether the right to take proceedings under the 23rd section of the Act of 1878 ceased on the death of the person by whose order the damage was caused, or survived against his personal representatives. It was argued, as in the present case, that the statute created a debt, payment of which it was intended should be enforceable against executors, that the liability was to pay something in the nature of a rate levied

(1) [1892] 2 Q. B. 515.

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for the use of extraordinary traffic, and, in support of the contractual view of the proceeding, the provisions in the section were relied on, under which an agreement could be entered into with the road authority for the payment to them of a composition in respect of extraordinary traffic. The question for decision is thus stated by Pollock, B., by whom the judgment of the Court was delivered: "What is the nature and character of these proceedings taken under section 23 of the Highways and Locomotives (Amendment) Act, 1878? Are these proceedings in the nature of an action of contract for a debt, or in the nature of an action for a personal tort?" The Court held that the proceedings were in the nature of an action for tort.

The decision of the Court was, that the proceedings were not founded in contract, and that they did not survive against a personal representative. As a foundation for this decision it was sufficient to exclude the element of contract as the foundation of the proceedings. The decision of the Court on this point is precisely applicable to the case before us, and although a decision of the English Court of Queen's Bench is not strictly binding on us, we should be prepared to follow it, even if it were not in accordance with our own opinion, leaving the difference to be decided by the Court of Appeal.

For myself, I should not be prepared to adopt some of the reasoning by which Pollock, B., supports the decision of the Court. "Somebody," he says, "has used the road in a manner which is excessive. Long before the passing of the Act, an indictment for a nuisance would lie in respect of such excessive user, and it is clear that the subject-matter of the proceeding by indictment would be tort. As locomotive engines became more commonly used on roads, the Legislature thought fit to provide that, instead of going through the form of an indictment at common law in each case, the damage to the road caused by the excessive user might be recovered by summary proceedings on an information founded upon the certificate of the surveyor." The remedy provided by the statute is in my opinion not only different in character from that provided by indictment, but more extensive in its operation, including compensation for an excessive user, which might fall short of indictable nuisance. For

the same reasons, I do not think that the cases referred to from 2nd Williams' Saunders are analogous to the case before us; for in those cases penalties were imposed for disobedience to the provisions of Acts of Parliament—conduct which was certainly tortious. The question, however, for our decision is not whether the proceedings in the present case are founded on tortious action on the part of the persons using the road, but whether they are referable to a contract, express or implied, entered into within the jurisdiction of this Court; and on this point the decision of the English Court of Queen's Bench rests upon a foundation independent of the reasoning to which I have referred.

In support of his argument that this is a statutory contract, Mr. Comyn referred us to some observations of Lord Watson in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1), where, referring to statutory provisions, by which a liability was imposed to make good damage to property of a certain kind, he says, "Such statutory provisions as those of section 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." These observations, which are expressly limited to local and personal Acts, have no application to liability created by a public and general statute. Local and personal legislation is promoted by individuals or public bodies for the assertion or protection of their individual interests, and it is opposed on considerations of the same character by persons or public bodies whose interest in the subject-matter gives them a *locus standi*. The obligations which are thus incurred have a contractual character which cannot be attributed to obligations imposed by the Legislature in the interests of the general public.

For these reasons, I am of opinion that the cause shown against the order of October 31st, 1912, should be allowed and the writ of summons set aside.

WRIGHT, J., concurred.

J. M.

(1) 7 A. C. 694, at p. 707.

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Dec. 9.

The plaintiffs appealed to the Court of Appeal (1).

P. Lynch, K.C., and *M. Comyn*, for the appellants :—

We contend that the plaintiffs are entitled under Order XI, Rule 1 (*f*), to an order giving them liberty to issue and serve the writ on the defendants out of the jurisdiction. The action is one to recover a statutory debt, and is founded not in tort but in contract. Section 1 of the Act of 1911 deals with compensation for damage caused by a lawful, as well as an unlawful, user of the plaintiffs' roads. No doubt, in *Story* v. *Sheard* (2), the Court held that proceedings taken under section 23 of the Highways and Locomotives (Amendment) Act, 1878, were in the nature of an action for a personal tort, so that such proceedings could not be taken against the executors of a person by whose order the extraordinary traffic was conducted, but we submit that decision should not be followed. The decision of Pollock, B., appears to be based on the fact that the remedy prior to the Act was an indictment for a nuisance, which was clearly a proceeding in the nature of one for a tort; but the intention of the Legislature in passing the Act of 1878, and the Irish Act of 1911, was to provide an entirely new remedy. Section 1 of the Act of 1911 is a "remedial and recuperative section," not a penal one: see judgment of Bowen, L.J., in *Hill* v. *Thomas* (3) and *Etherley Grange Coal Co., Ltd.* v. *Auckland District Highway Board* (4). *Story* v. *Sheard* (2) is inconsistent with the principle of the decision in *Glynn* v. *Clare County Council* (5), where this Court held that a right to compensation for malicious injury survived to the personal representative of an applicant who died pending the hearing of the case. The statutory provisions must be regarded as having created a contract between the plaintiffs and the defendants, and it is on foot of such contract that the present action is brought: see judgment of Lord Watson in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (6).

(1) In the Court of Appeal, before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) [1892] 2 Q. B. 515.

(3) [1893] 2 Q. B. 333, at p. 341.

(4) [1894] 1 Q. B. 37.

(5) [1910] 2 I. R. 666.

(6) 7 A. C. 694, at p. 707.

We are also prepared to argue that the action comes within Order XI, Rule 1 (*b*), as being one to enforce an obligation or liability "affecting land or hereditaments situate within the jurisdiction." The definition of "land" in section 3 of the Interpretation Act, 1889, is sufficiently wide to include the roads vested in the plaintiffs, and the obligation or liability imposed on the defendants by section 1 of the Act of 1911 is one affecting such land or hereditaments which are situate within the jurisdiction. In *Kaye* v. *Sutherland* (1) it was held that an action by an outgoing tenant to recover compensation for tenant-right according to the custom of the country, was an action within the corresponding English rule. There can be no distinction between a liability to pay for repairs to roads and a liability to repair the roads themselves; each liability is equally one affecting land or hereditaments.

We further say that if the order of the King's Bench Division be allowed to stand, the plaintiffs are left without a remedy. By section 1 (4) of the Act of 1911, as the expenses exceed £250, they must be recovered "in the High Court"; and there is no "High Court" in Scotland. Further, it is enacted by the Interpretation Act, 1889, section 13 (3) that the expression "High Court," when used with reference to Ireland, shall mean the High Court of Justice in Ireland; it is in that tribunal that we have, we submit properly, brought our action; and the issue of the writ, and the service thereof, ought to be allowed to stand.

Gerald FitzGibbon, K.C., and *E. J. Phelps*, for the respondents:—

This is in no sense an action upon a contract, and even if it were, there was no contract "made or entered into within the jurisdiction." It is contended by the plaintiffs that the 1st section of the Act of 1911 itself created a contract; but the Act was not even in operation when all, or practically all, of the acts complained of were done. But in no case was there a contract, express or implied; the action is one to enforce a statutory liability to compensate the County Council for damage to their roads.

(1) 20 Q. B. D. 147.

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That is an action of *debt*, which, according to Tidd's Practice, 9th ed., vol. i, p. 3, will lie, not only on records, upon specialties, and on simple contracts, but also may be founded "*in maleficio*," "upon Acts of Parliament, by the parties grieved, or common informers." It is not necessary for us to contend that the action is one founded on tort, although *Story* v. *Sheard* (1), which has never been over-ruled, is an authority for that proposition; it is enough to say that the action is not one of contract. That a proceeding to recover money compensation may lie neither in contract nor in tort is shown by the judgment of Farwell, L.J., in *Darlington* v. *Roscoe & Sons* (2), where, speaking of the duty imposed by the Workmen's Compensation Act, 1897, he said, "it is neither tort nor contract, but a statutory duty."

As to rule 1 (*b*) of Order XI, the action cannot be brought within it, as the governing words of the rule are, "affecting land or hereditaments situate within the jurisdiction"; and the obligation or liability now sought to be enforced in no way affects any land or hereditaments; the duty of the County Council to repair their roads remains unaffected by the Act of 1911; having repaired them, they may, under the Act, recover some of the expenses from a person who has by excessive user contributed to the destruction of the roads, but the action to recover such expenses does not affect the roads; it only affects the person sought to be charged. This distinction is made clear in *Casey* v. *Arnott* (3), where it was held that a statement in the nature of a slander on title made out of the jurisdiction concerning property situate within the jurisdiction was not an act or thing affecting such property within the meaning of the rule. *Agnew* v. *Usher* (4) is to the same effect, where it was held that an action to obtain payment of rent was not one to enforce "any act, deed," &c., affecting land within the jurisdiction. The true scope of clause (*b*) is explained by Palles, C.B., in *The Attorney-General* v. *The Drapers' Co.* (5). It is impossible to bring the present action

(1) [1892] 2 Q. B. 515.
(2) [1907] 1 K. B. 219, at p. 230.
(3) 2 C. P. D. 24.
(4) 14 Q. B. D. 78.
(5) [1894] 1 I. R. 185, at p. 203.

within any of the classes of action there specified: see also *Russell* v. *Le Bert* (1). As to the suggested hardship on the plaintiffs, it is open to them to sue the defendants for damages in Scotland, and it is to be remarked that the corresponding English Order contains no clause similar to clause (*f*) in the Irish Order, so that if this clause is to be strained in favour of Irish County Councils to enable them to sue in Ireland defendants resident in England, they will obtain an advantage unknown to English public bodies who are desirous of suing under similar circumstances defendants resident in Ireland.

Comyn replied.

[The following cases were also referred to: *Epsom Urban District Council* v. *London County Council* (2), and *Billericay Rural Council* v. *Poplar Union and Keeling* (3).]

THE LORD CHANCELLOR:— Dec. 17.

The Public Roads (Ireland) Act, 1911, was an important Statute, intended to provide the ratepayers in Ireland with protection against the additional expenses rendered necessary by the damage done by the carriage of excessive weights or extraordinary traffic over the main or other public roads. The claim against the proposed defendants is a purely civil and statutory one, and arises from the express specific provisions of the Act. Nothing criminal or tortious is asserted against the defendants; and the Irish Act is in that respect wholly analogous to the Act in England. In *Hill* v. *Thomas* (4) Lord Justice Bowen, in dealing with the corresponding section to that now in question, stated, upon the suggestion that the act involved was of a criminal nature: "Here again the answer is that the section is not penal, but remedial and recuperative; and that is because, though he carries ordinary articles, he does not carry them in the manner or on the limited number of occasions in and on which other people carry them, and because the frequency of his

(1) [1896] 1 I. R. 334.
(2) [1900] 2 Q. B. 751.
(3) [1911] 1 K. B. 734; [1911] 2 K. B. 801.
(4) [1893] 2 Q. B. 333.

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travels over the road has caused the special mischief to the road, that such frequency constitutes in itself a reason why he should pay more than his neighbour." The Lord Justice further pointed out that the relief was commensurate with the damage done, and that it was placed on the shoulders of the persons responsible for the damage. The exposition of the Lord Justice is perfectly plain and definite. Just as in England, the Act of 1911, in its corresponding section, is in no sense penal, is the subject of this complaint, but is remedial and recuperative. On the present occasion, I understand that the intended defendants, a Scotch firm, were engaged from November, 1910, to May, 1912, in conveying in heavy weights, on large vehicles and traction-engines, timber cut at Glenomera, in Co. Clare, along the main road, a distance of many miles to the City of Limerick, for shipment there. Having regard to the amount, namely, £469, claimed, the action has necessarily been sought to be carried out in the High Court of Justice in Ireland. In fact, there is no other tribunal outside of Ireland in which the claim could be laid or entertained.

It appears clear, however, that the Act is operative against all persons wherever resident, either in England or in Scotland. We know from general experience that the leading companies, firms, and individuals from England and Scotland, who in Ireland use the roads and injure them by conveying excessive weights over them, or using them for extraordinary traffic, are in fact largely responsible, and in scattered places, no doubt, for injuries done to the roads. It would be impossible to think that such persons were not to be held responsible to the provisions of the Act. The objection here is that the counsel for the Messrs. Wilson insist that the plaintiffs cannot avail themselves of the Order XI (1905), relating to the service out of the jurisdiction of a writ of summons. Though many clauses are contained in it, and obviously intended to cover the area of civil liabilities, it is contended that the Order and clauses are not sufficient to comprehend the liability relied on in this claim. I do not say anything to prejudge the merits of the action in any shape or form. But the legal question discussed is of high importance. I cannot and do not imagine that it would be possible for the

Legislature not to have been careful of the adequacy of the Act it was passing, to provide for Ireland a remedy of an effective kind for the ratepayers, and the County Councils, and other local road authorities in Ireland. Order XI, in specifying the causes of action in which service out of the jurisdiction could be allowed, was apparently contrived to cover the whole area of civil liabilities. Torts, certainly, were in no way included, though no doubt actions for criminal conversation have, since the Order of 1899, been added as a subject within Order XI. But in the general contemplation, the principle of distinction taken was between mere civil liabilities and actions founded on tortious claims. No one, in my judgment, can consider the liability raised by the Act of 1911, in cases like the present, anything but a civil liability. And following the clear interpretation of the Statute, and the decision of Bowen, L.J., in *Hill* v. *Thomas* (1), the section here, like the section in *Hill* v. *Thomas* (1), is not and never was considered by any Court as a penal section. According to the views expressly stated by the Lord Justice, they are remedial and recuperative. I cannot but think that Parliament, with its sense and knowledge of the distinctive treatments open in Ireland, in civil cases as distinct from actions founded on torts, must have passed the Act relating to the present action with the assurance that the Irish High Court had full authority to obey the command of the Statute to enforce the claims placed exclusively within their jurisdiction. I think, accordingly, that the Act was passed on the view that the High Court had ample authority to enforce the provisions of the Act. In *The Attorney-General* v. *The Drapers' Co.* (2) the Lord Chief Baron Palles, towards the end of pages 199–200, laid it down: "Accordingly it will be found that each clause of this Order XI is referable to some well-recognized principle giving jurisdiction to the Courts of this country, notwithstanding the residence of the defendant elsewhere. Most of these principles are referred to in the judgment of Lord Westbury, in *Cookney* v. *Anderson* (3). He there refers to the two grounds on which the Legislature of any country is

(1) [1893] 2 Q. B. 333. (2) [1894] 1 I. R. 185.
(3) 1 De G. J. & S. 365.

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warranted in conferring on its civil tribunals an extra-territorial jurisdiction as being — 'one, the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance; the other, the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested, wherever resident, where the subject of the suit arises or is situated within its own territory, and falls to be determined by its own law, and the judgment of its own Courts of civil judicature.'"

The Lord Chief Baron Palles quoted, on p. 200, another principle from Lord Westbury in the same judgment in these words, "If, therefore, an action or suit be commenced in the Courts of a particular country relating to a subject which, by this consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties."

No other construction could, I think, conform with the plain aim of the statute—its purpose of affording a convenient, effective, and local trial of the controversies raised. The Lord Chief Baron quotes and indorses the important principle just quoted from Lord Westbury. And if we had no such rule as Order XI, the Courts in Ireland exclusively conferred with any jurisdiction in the present action could direct the issue of the necessary legal processes to summon persons responsible in financial liabilities of the character now in question, but resident out of the country, to come for adjudication within the cognizance of the Court.

But while I have indicated that view—a full answer, as I venture to think, to the refusal now appealed from—I pass at once to the Order XI, section 1 (*b*). The words in it are, in my opinion, perfectly applicable to the present claim. It is a claim to enforce in an action a liability, and even a statutory liability, against the Messrs. Wilson, affecting land in Ireland. The claim is proposed to be made in the only possible tribunal. After reference to the power to allow the service out of the jurisdiction of a writ of summons or a notice thereof, several classes of cases are dealt with, and classified alphabetically. Though, in a rule of 1899, an action of criminal conversation was added to the actions within

the scope of the Order XI, as made in 1891, the order was plainly devised and constructed for the purpose of covering the general area of civil liabilities, excluding as a matter of principle cases of all tortious claims. I propose simply to refer to the words of sub-clause (*b*). After the opening words of the order enabling the Court or a Judge, as the case may be, to give leave to an intended plaintiff to cause either a writ of summons, or notice of a writ of summons, to be served out of the jurisdiction in one of the various alphabetically marked classes of civil liabilities, forming the subject of the order, sub-clause (*b*) gives the power in the following terms: — "Whenever any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action." But the words have been in no way defined, and those particularly alluded to are the words "obligation or liability affecting land . . . is sought to be construed, rectified, set aside, or enforced in the action." The Lord Chief Baron, in *The Attorney-General* v. *The Drapers' Co.* (p. 201), further declared that the words were unlimited, and that the argument made for limiting them, had no foundation.

The rules of the Supreme Court, Ireland, dated 1905, are made primarily under the powers of the Judicature Act, 1877, section 61. Order XI is one of these rules, and the contrast is manifest, drawn between actions on civil liabilities, and the claims based on torts. There is the single exception I already mentioned. But everyone assumed that civil liabilities were, as a rule, enforceable in Ireland, where the subject-matter was locally existing in the country. The application could not have been more confidently made than in the present case, for the Act of 1911 has made the High Court of Justice in Ireland the exclusive jurisdiction before which the action could be instituted. Regarding for a moment what I have already quoted from Lord Westbury, I think it follows that in such a case as the present, the High Court being the tribunal in which the action must be instituted, the Act means that the tribunal must have the powers requisite for it to administer the Act. The road authorities are directly given power by the Act to recover the proper amount from the persons responsible—and this must mean wherever resident.

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The provision necessarily means that the action must take place in Ireland.

Then, on the actual words of Order XI (*b*), it is plain that the liability in question is within the class dealt with. It affects land—the road of which it is now certain that the road authorities have the right to take control and possession, for the purpose of doing the necessary repairs. I refer to the recent decision in the County Cavan Council case. The council taking action has that control and possession of the road in question in this case.

The claim is a civil liability and of statutory force, affecting land. The county council is authorized by the Act to recover from the persons responsible the reasonable amount necessary to make the repairs. That is a definite, actual relation with the land, which is a public road for the general convenience and use. The action for the money is instituted as a plain enforcement of the liability, and the action must be established in the High Court in Ireland. I see nothing to exclude the case from the application of Order XI.

Accordingly, in my personal view, the order of the King's Bench Court ought to be reversed, and the writ of summons or notice should be allowed to be served on the proposed defendants.

HOLMES, L.J.:—

This is an appeal from an order refusing liberty to serve the writ on the defendants out of the jurisdiction. The alleged cause of action arises under the Public Roads (Ireland) Act, 1911, section 1, whereby a county council liable to repair a public road, on finding from the certificate of their surveyor that extraordinary expenses have become necessary for such repair by reason of damage caused thereto by excessive weight passing over it, or by extraordinary traffic thereon, may recover from any person in consequence of whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case. The defendants, who reside in Scotland, purchased growing timber in county Clare; and the excessive weight and extraordinary traffic relied on as giving the plaintiffs their cause of action consist

in defendants having carried large quantities of felled timber by means of traction engines and carts over certain roads in the county.

I assume that a cause of action under the Act of 1911 is sufficiently stated in the writ, and that the only question for our decision is whether the King's Bench Division had jurisdiction to make the order applied for. This depends upon Order XI, Rule 1. If the writ comes within any of the eight classes enumerated therein, and indicated by the letters of the alphabet from (*a*) to (*h*), the order could have been made; aad the class relied on in the Divisional Court and also in this Court by Mr. Lynch when opening the appeal is that marked (*f*), which provides for an order for service of the writ out of the jurisdiction whenever the action is brought on a contract made or entered into within the jurisdiction. The corresponding rule in England contains only seven classes, and the class not to be found therein is our class (*f*), but class (*g*) in both rules deals with actions brought on contracts; and there is no doubt that our classes (*e*) and (*f*), as well as the English class (*e*), only relate to actions of contract. Now, at first sight, the present action seems to have no resemblance to such an action. The legal as well as the popular conception of a contract is an agreement express or implied between two persons; and an action *ex contractu* is an action brought by one of them against the other in relation to what has been so agreed to. I am unable to see how an obligation imposed by a public statute upon persons against their will or, at least, without their consent, can be described as the result of a contract. It will be observed that I speak of a public statute, as I exclude from what I have said private Acts, which it has been held may, in certain cases, be regarded as a parliamentary sanction or authorization of agreements made between individuals. I have never heard, however, of the application of such a principle to public statutes. The section under which the writ is issued seems to me in itself to distinguish between such an action as the present and an action of contract, for it contains a proviso that any person against whom expenses may be recoverable may enter into an agreement with the council for the payment of a composition in respect of such weight and traffic, and thereupon the persons

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paying the same—that is fulfilling their contract—should not be subject to any proceedings under the section. Authority in this case gives little assistance. Although an English Act containing substantially the same provision as that contained in the Irish Act of 1911 was passed in 1878, no question like that with which I am now dealing could have arisen under it in consequence of the absence of our class (*f*) from the English Order XI. Still, *Story* v. *Sheard* (1), decided in 1892, is a distinct decision that such an action as the present is in the nature of an action of tort, and not of contract or debt. I am not aware of any subsequent conflicting authority; but it is argued by counsel for the appellants that it is inconsistent with the opinion expressed by Lord Bowen in *Hill* v. *Thomas* (2), that the extraordinary traffic mentioned in the Act of 1878 is not necessarily illegal, but may be a lawful use of the road. Notwithstanding this, the action for the expenses may be in the nature of an action of tort; but whether it is so or not is in my opinion immaterial, inasmuch as I am satisfied that it is not an action of contract within the meaning of Order XI, Rule 1 (*e*) and (*f*).

I have thus so far dealt with the only ground relied on by Mr. Lynch in the Divisional Court, and this Court in support of his application for an order to serve the writ out of the jurisdiction; but when he had concluded his argument, Cherry, L.J., called attention to Rule 1 (*b*) of Order XI, and inquired whether it had any bearing on the subject of discussion. This did not come upon counsel by surprise, because in the Divisional Court, Madden, J., asked the same question, but afterwards withdrew it, saying that on further consideration he thought Rule 1 (*b*) did not apply. I confess to having always regarded with some distrust a point suggested by the Bench which had been considered and rejected by counsel in whose favour it might tell. At our request, however, the meaning of class 1 (*b*) has been dealt with by Mr. Comyn for the plaintiffs, and Mr. FitzGibbon for the defendants. After careful consideration, I am of opinion that this action does not come within it. The action to which it relates is one in which any act, deed, will, contract, obligation, or

(1) [1892] 2 Q. B. 515. (2) [1893] 2 Q. B. 333, at p. 341.

liability affecting land or hereditaments, situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced. Is this an action to enforce an obligation or liability affecting land or hereditaments within the jurisdiction? I think not. There is here no obligation or liability *affecting* land. These words must mean something that attaches to and affects the land itself, such as carrying out the trusts relating thereto under a will or deed, suits for redemption or foreclosure, the renewal of leases and similar actions in which orders for service out of the jurisdiction are frequently made. In this case the road is no doubt land; but the action does not affect it in any way. The defendants are under no obligation to repair it; and to attempt to do so by them would be a trespass. The repairs can only be done by the plaintiffs; and their right is confined to recovering by a personal action portion of their expenses from the defendants. This view is confirmed by two English authorities. *Agnew* v. *Usher* (1) was heard by a strong Court, and it was held that a writ for non-payment of rent under a lease of land in England could not be the subject of an order for service thereof on the defendants in Scotland. "I do not," said Lord Coleridge, "intend to give a complete or exhaustive account of all possible proceedings 'affecting land,' which are probably within clause (*b*), but according to the ordinary rules of construction and legal phraseology, an action to obtain payment of rent certainly is not an action to enforce any 'act, deed, or will'; and I do not think it is to enforce any 'contract, obligation, or liability, affecting land within the jurisdiction.'" This decision was discussed in *Kaye* v. *Sutherland* (2), and approved of; but it was held in that case, that an action by an outgoing tenant of a farm in Yorkshire for compensation for tenant-right was a contract, obligation, or liability affecting land. Stephen, J., said, "the land was let under a contract made subject to the custom of the country in respect of paying compensation for tenant-right." . . . "The contract is therefore upon terms affecting a certain definite portion of land." He then points out that this custom is not so strong as the custom of gavelkind or borough English, but

(1) 14 Q. B. D. 78. (2) 20 Q. B. D. 147.

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is analogous thereto. No case can be found going farther than this; and the difference between it and the present action is such as cannot be got over. I therefore hold that neither clause (*b*) nor clause (*f*) gives jurisdiction to make the order applied for. Therefore the appeal must be dismissed.

CHERRY, L.J.:—

This is an action brought by the Clare County Council against three defendants, all residing in Scotland, to recover the amount of extraordinary expenses incurred by the plaintiffs in repairing certain roads within their county, by reason of the damage caused by the servants of the defendants to the roads through the excessive weight of vehicles (traction-engines and carts) driven over the roads. The cause of action arises under section 1 of the Public Roads (Ireland) Act, 1911 (1 & 2 Geo. 5, c. 45); and the question for our decision is, whether the writ can be served out of the jurisdiction.

It was argued that the case comes within two of the sub-clauses of Order XI, Rule 1, of the Rules of the High Court, viz., sub-clauses (*b*) and (*f*). I shall deal with the latter sub-clause first, as it appears to me to be the one upon which counsel for the plaintiffs mainly relied. Indeed, we were told that they did not argue the case under sub-clause (*b*) in the Court below at all, and they only argued it here in response to a suggestion from the Bench, for which I fear I was responsible. Their main reliance is upon sub-clause (*f*), which provides that service out of the jurisdiction may be allowed whenever "the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in the action, or for the breach whereof damages or other relief are or is demanded in such action was made or entered into within the jurisdiction."

But is this statutory liability to pay for the repair of roads damaged by the defendants a contract at all? and how can it be said, even if it is a contract, to be "made or entered into within the jurisdiction"?

The chief, and indeed the only, authority relied upon by Mr. Lynch and Mr. Comyn in support of their argument that

this statutory liability was a contract "made or entered into within the jurisdiction" was a passage from the judgment of Lord Watson in the case of *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1) where, referring to a private Act of Parliament by which the respondents were bound, in certain circumstances, to make good to the appellant all damages caused by the escape of water from a reservoir, he says—"But such statutory provisions as those of section 43, *occurring in a local and personal Act*, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature" (p. 707).

As pointed out by Madden, J., in his judgment in the Court below, this doctrine of a statutory contract being created by an Act of Parliament has always been confined to Private Acts, and it has never, so far as I am aware, been extended to a Public and General Act.

Apart from this argument, based upon the judgment of Lord Watson, there is really nothing to be said in favour of the view that a statutory liability such as that created by this Act of Parliament can be considered to be a contract. Indeed, it has been expressly decided in England that the proceedings under the corresponding English Act, the Highways and Locomotives (Amendment) Act, 1878, are in the nature of an action to recover damages for a personal tort, so that such proceedings cannot be taken against the executor of a person by whose order the extraordinary traffic was conducted: *Story* v. *Sheard* (2). This decision being that of a Divisional Court is not, of course, binding upon us, and it goes further, as Madden, J., in his judgment in the Court below, points out, than is necessary for the defendants' argument in the present case. But I think that it is founded on good sense, and so far as it decides that the liability created by the statute is not in its nature *ex contractu*, I think it is good law. It may be, as was argued by the appellants' counsel here, that the user of the roads which gives rise to this liability is not necessarily tortious, or such as to create a public nuisance; but they must go a great deal further than this. They must show

(1) 7 App. Cas. 694.

(2) [1892] 2 Q. B. 515.

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that it arises from a contract "made or entered into within the jurisdiction," and in this I think that they hopelessly fail.

The other branch of the plaintiffs' argument is based upon sub-clause (*b*) of Order XI, Rule 1, which enables the writ to be served out of the jurisdiction, "whenever any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action." I must confess that at first I formed a very strong opinion that the cause of action in this case was a "liability affecting land" within the meaning of this part of the rule. It is a duty to repay to the County Council the expenses incurred by them in the repair of public roads, which must be regarded as land. It is a duty which exists quite independently of any contract, and, in case the damage amounts to a public nuisance, independently even of the statute, as was decided by this Court in the case of *Cavan County Council* v. *Kane* (1). I have, however, been convinced by the able argument of Mr. FitzGibbon that my first view was wrong, and that the plaintiffs cannot succeed in bringing the case within sub-clause (*b*) any more than they can bring it within sub-clause (*f*).

The important word in this sub-clause is "affecting." If the words were "liability connected with land," it might be very well argued that a cause of action such as this would be within the rule. The statutory liability here arises out of something done to the land, but it is merely a liability to pay money and not a liability to do anything to or with the land. A liability affecting land must, I think, be either an obligation to do something physically to the land, as in the case of a covenant to repair, or an obligation which may be enforced against the land as in the case of a mortgage or a duty to pay a sum of money charged upon the land.

This view, is, I think, the one most in accordance with the authorities, though it is difficult to reconcile all the cases. There is no Irish decision to which we have been referred at all like the present case, but in *The Attorney-General* v. *The Drapers' Co.* (2),

(1) Reported in K. B. D. in [1910] 2 I. R. 644.

(2) [1894] 1 I. R., at p. 203.

Palles, C.B., uses the following words : "Upon the whole, I am of opinion that the ground of jurisdiction under clause (*b*) is the existence of a charge, obligation, or liability affecting land in this country, either solely or in common with other property, and that where such other property is affected by the charge, the jurisdiction of the Courts of this country, according to international law, extends to giving relief in relation to that charge or obligation, not only as against the real property in this country, but in relation to the entire property upon which it is charged."

This view of the clause is not consistent with holding that it applies to a mere money claim for damages arising from injury to the land.

In England it has been held that the sub-clause does not apply to an action for slander of title: *Casey* v. *Arnott* (1), or to an action for rent against the assignee of a lease: *Agnew* v. *Usher* (2); but that it does apply to an action for damages for breach of covenant to repair: *Tassell* v. *Hallen* (3), and to an action for compensation for tenant-right according to the custom of the country: *Kaye* v. *Sutherland* (4). "The land is affected," says Stephen, J., in that case, "in the sense that it is held subject to the custom which forms part of the contract under which land is usually taken in that part of the country" (at p. 150). I find it difficult to reconcile this last case with the decision of the same Court in *Agnew* v. *Usher* (2); but even if it is to be considered as rightly decided, it cannot help the plaintiffs here very much.

One other argument remains to be dealt with. It is said that inasmuch as the Public Roads (Ireland) Act applies to Ireland only, and as the first section provides that proceedings must be taken under it either in the County Court or High Court of Justice in Ireland (for under the Interpretation Act, 1889, the term "High Court" when used with reference to Ireland refers to the High Court of Justice in Ireland), there will be a denial of justice in this case if the proceedings are not allowed to be taken in Ireland. To this argument I think there are several answers. In the first place, I do not think that it is at all clear

(1) 2 C. P. D. 24.
(2) 14 Q. B. D. 78.
(3) [1892] 1 Q. B. 321.
(4) 20 Q. B. D. 147.

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that proceedings cannot be taken in Scotland. Section 2 (4) may be read as merely an enabling section, and as not excluding the jurisdiction of either the English High Court of Justice or the Scotch Court of Session in case the persons sued are residing in England or Scotland. In the second place, I think that though the plaintiff may not be able to make a claim under this statute against persons residing out of the jurisdiction, they can obtain leave to issue a writ for service out of jurisdiction in an action of a similar nature based upon the case of *Cavan County Council* v. *Kane* (1), provided they also claim an injunction. Such a case would, apparently, come under sub-clause (*g*). In the third place, I do not think that the Courts in this country can legitimately extend their jurisdiction over persons outside of the jurisdiction on any grounds of hardship or inconvenience towards persons within it. Questions of jurisdiction must, I think, be decided upon a strict interpretation of the rules and orders, and it must be left to Parliament to remedy the grievance, if any arises from such interpretation.

For these reasons I am of opinion that the decision of the King's Bench Division in this case should be affirmed.

Solicitor for the plaintiffs (appellants): *J. F. Cullinan.*
Solicitors for the defendants (respondents): *M. Sellors & Co.*

R. ST. J. C.

(1) Reported in K. B. D. in [1910] 2 I. R. 644.

THE KING (WALSH) *v.* SWIFTE (1).

K. B. Div. 1912.
July 1, 18.
Appeal.
Oct. 30.

Caretaker—Club premises—Legal estate in trustees—Secretary of club acting as their agent—Owner by estoppel—Summary procedure—Landlord and Tenant Act (Ireland), 1860 (23 & 24 *Vict. c.* 154), *s.* 86—Certiorari—*Discretion of Court.*

A, the secretary of a club, put B, as caretaker, into possession of a cottage on grounds belonging to the club, the legal estate in which was vested in trustees for the club. B, having refused to give up possession to A, on demand after reasonable notice, A obtained from the Chief Divisional Magistrate (within whose jurisdiction the premises were) an order for possession under section 86 of the 23 & 24 Vict. c. 154.

Held, by the King's Bench Division, on application by B for *certiorari*, and by the Court of Appeal affirming their decision, that the order of the Chief Magistrate was right on the grounds that A was owner by estoppel, and was also the known agent of the actual owners of the club premises.

Held, also, by the Court of Appeal, B having been put out of possession in the interval between the decision of the King's Bench Division and the hearing of the appeal, that the Court, in the exercise of its judicial discretion, would refuse to grant *certiorari*.

CERTIORARI.

A summons under the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154), s. 86, was on the 30th April, 1912, issued by Cecil F. Ruxton, as complainant, against the prosecutor, John Walsh, as defendant, requiring defendant to give up possession of certain premises at Lansdowne Road, Dublin, "into possession of which you," the defendant, "had been put by permission of the complainant, the owner thereof, as caretaker." On the hearing of this summons on May 8th, 1912, the Chief Magistrate, Mr. Swifte, K.C., made an order for possession in the usual form.

Mr. Ruxton was in fact Secretary of the Irish Rugby Football Union, for whom the Lansdowne Road football grounds were vested in trustees. In June, 1907, he engaged Walsh as caretaker for the grounds at £1 a week. A cottage as a

(1) In the King's Bench Division before LORD O'BRIEN, L.C.J., and DODD, J.

K. B. Div. 1912.

THE KING (WALSH) *v.* SWIFTE.

pavilion was afterwards erected on the grounds; and in May, 1911, Mr. Ruxton put Walsh in possession of this cottage, thenceforward paying him the reduced wages of 18*s.* a week. On April 11th, 1912, Walsh was given the following notice to quit, in writing:—

"IRISH RUGBY FOOTBALL UNION,
"17, WESTMORELAND STREET, DUBLIN,
"11*th April*, 1912.

"TO MR. JOHN WALSH,

"My committee desire to inform you that they will not require your services on or after Saturday, April 20th, 1912.

"C. F. RUXTON, *Hon. Sec.*"

On April 20th all wages due were paid to Walsh, and possession of the premises was orally demanded from him, when he asked to be allowed to remain till Thursday, on which day he promised to give up possession at 2 o'clock p.m., but did not do so, though Mr. Ruxton attended, and again demanded possession; and Walsh still continued in possession.

Before Mr. Swifte the case was made that Walsh was a weekly tenant at 2*s.* a week, and did not come within the 86th section.

A conditional order for a *certiorari* having been obtained by Walsh to quash the Chief Magistrate's order on that ground, and also on the ground that the complainant was not the owner, or the known agent or receiver for the owner, of the premises, cause was shown by Mr. Ruxton; and the prosecutor moved to make absolute the conditional order, notwithstanding the cause shown.

Hanna, K.C., and *Condon*, for the prosecutor.
Denning, for Mr. Ruxton.

July 18. LORD O'BRIEN, L.C.J.:—

The facts of this case are very few, and it may be shortly disposed of.

A man named John Walsh was put into possession of certain premises as caretaker by a Mr. Ruxton, who was Secretary to

the Irish Rugby Football Union. Walsh did not, in Mr. Ruxton's estimation, give satisfaction; and Mr. Ruxton, having demanded possession of the premises, sought to eject him and recover the premises under the 86th section of 23 & 24 Vict. c. 154, commonly known as Deasy's Act. That section enables a person who is owner of the premises to proceed for recovery of them. It was contended that Mr. Ruxton was not owner of these premises, and that, accordingly, he had no power to eject Walsh by summary process under the section; but Mr. Swifte, the Chief Magistrate, shortly, and I think correctly, disposed of this contention by holding that Walsh, who was put into possession by Mr. Ruxton, was "estopped" from denying that Mr. Ruxton, *quoad* him (Walsh), was the owner of the premises. Mr. Swifte granted a warrant against Walsh for the recovery of the premises. We had not a copy of that warrant, and we directed the Registrar to write for one; in reply he received from the Chief Magistrate the following communication:—

"13*th June*, 1912.

"SIR,—In reply to your letter of the 7th inst. with reference to the above case, I beg to enclose you for the information of their lordships the Judges a copy of a warrant in the case, the original of which I have signed, but have not yet issued pending their lordships' decision. In granting the warrant I held that the defendant was estopped from disputing the title of Cecil Ruxton, who had put him into possession; and that, as between them, Ruxton was owner of the premises. As showing that the doctrine of estoppel would apply to a caretaker (which I held the defendant to be) as much as to a tenant, I beg to refer to the case of *Doe* d. *Johnson* v. *Baytup* (1).

"The warrant follows the usual form in such cases; and I may mention that, as a matter of practice with regard to these ejectments, no order apart from the warrant is ever drawn up, the section (section 86 of 23 & 24 Vict. c. 154) apparently not contemplating the making of any such order. The entry in our ejectment summons book here is merely a memorandum from

(1) 3 Ad. & Ell. 188.

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THE KING (WALSH) *v.* SWIFTE.

Lord O'Brien, L.C.J.

which the formal warrant is drawn up, and is in no sense equivalent to the Petty Sessions Order Book. See *R.* (*Cahill*) v, *Divisional Justices* (1).

"I am, sir,

"Your obedient servant,

"ERNEST G. SWIFTE (Chief Magistrate)."

This is all very clear. So far as Mr. Swifte's action was concerned, everything was correct and clear; but, as Mr. Hanna and Dr. Condon, who argued the case so well, pointed out, there was an element of inconsistency in the case; this element of inconsistency was, however, imported into it by Mr. Ruxton, who sought to support Mr. Swifte's decision on a ground upon which Mr. Swifte did not himself rest it. Mr. Swifte rested his decision upon "estoppel"; but Mr. Ruxton endeavoured to support the decision on the ground that he (Mr. Ruxton) was an agent of the owner and acted only as such. But this would be merely an alternative view equally effective for the recovery of the premises; because Mr. Ruxton, whether as owner, as he would be regarded from the point of view of estoppel, or as agent of the owner, as he would be from the standpoint of fact, would be equally entitled to recover the premises under the 86th section of Deasy's Act. I think it is to be regretted that Walsh did not fulfil the undertaking referred to towards the close of the second paragraph of Mr. Ruxton's affidavit, to deliver up clear possession. Perhaps it is not too late to fulfil that undertaking and to end the case.

DODD, J.:—

I concur. Mr. Ruxton was the servant of the Rugby Union, and he employed Walsh as a servant of the club; and he gave Walsh, as a servant of the club, a room above the pavilion of the club. Walsh was dismissed, and, when Mr. Ruxton, as the secretary, demanded that he should give up possession, Walsh would not give up possession of the premises. The question is, Was Ruxton the "owner" or "known agent of the owner" under the circumstances?

(1) [1904] 2 I. R., p 698.

The question involves the meaning to be attached to the word "owner"; and the definition I adopt is this, viz., that the owner is the person for the time being, as against the person in question, entitled to the possession of the premises. No technical meaning is required. Mr. Hanna and Dr. Condon suggest that the ground is vested in trustees, and that they are the owners. In my opinion the trustees have nothing to do with the case. They did not manage the club; they did not employ Walsh, nor give him possession, nor dismiss him. Either the club or Mr. Ruxton is the "owner." If it is the club, it is all right, as Mr. Ruxton is the secretary; if Mr. Ruxton is the "owner," it is all right, and he can carry out the ejectment. I concur in what the learned Lord Chief Justice has said, and I adopt the opinion of Mr. Swifte that, under the particular circumstances, Walsh was estopped.

The club is one of great sporting spirit, and Walsh is the servant of the club, and, no doubt, also of a sporting spirit, and the parties might yet take a sportsmanlike view of the matter, and do away with all difficulties.

C. N. K.

Oct. 30.

The prosecutor appealed to the Court of Appeal (1).

Hanna, K.C., and *Condon* for the appellant:—

The Chief Magistrate and the Divisional Court rested the case on the ground of estoppel, relying on the old case of *Doe* d. *Johnson* v. *Baytup* (2). But that was a case where possession was fraudulently obtained under false pretences. There can be no estoppel where the real facts are known. Mr. Ruxton never purported to act as owner. All through he acknowledged that he was merely the secretary of the football club. But even if his position as secretary made him their "known agent or receiver," they were not the owners of the premises, which were admittedly vested in trustees. Ruxton was

(1) In the Court of Appeal before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) 3 A. & E. 188.

Appeal. 1912.

THE KING (WALSH) *v.* SWIFTE.

certainly not agent or receiver for the trustees, who neither authorized nor had any knowledge of the proceedings.

To come within the section, the agent must be duly authorized by the owner, the eviction of the caretaker must be within the scope of that authority, and the existence of the authority must be known to the caretaker: *Murphy* v. *Grady* (1).

Denning for the respondent was not called on.

THE LORD CHANCELLOR:—

I think the judgment of the King's Bench Division ought to be affirmed, and I cannot see why the doctrine of estoppel should not be applied. This caretaker took possession, not from the trustees, but from Mr. Ruxton. Upon that ground alone I should be prepared to follow and accept the judgment of the King's Bench Division; but I feel bound also to consider the issue raised under section 86 of the Act of 1860. The only question here was as to the football ground and pavilion, and it was known that Mr. Ruxton was the agent of the technical legal owners of this plot, and therefore a perfectly competent person to be made complainant in the summons. Then comes the question of the Court's discretion in dealing with a writ of *certiorari*. Where possession has been *de facto* lost, the Court is not only entitled, but in the position of this case ought, to take that circumstance into account as a valid reason for not setting aside the judgment of the Divisional Court. The order has been executed; the man has ceased to be caretaker and is out of possession, and I do not think the Court should do anything to cancel the proceedings.

HOLMES, L.J.:

I am satisfied with the grounds upon which this case was decided by Mr. Swifte. This man—Walsh—entered into an agreement with Mr. Ruxton to become a caretaker of these premises; and I think, in the circumstances, he is estopped from saying that Mr. Ruxton was not the owner. Therefore, on the ground of

(1) [1904] 2 I. R. 591.

estoppel, I would support the judgment of the Court below. But, apart from estoppel, I infer from the evidence that Mr. Ruxton was the known agent of every person interested in the pavilion and grounds, including the trustees, and that as such he appointed Walsh the caretaker. We may add that a private individual is not entitled to obtain a writ of *certiorari* as a matter of right, and that we ought also to refuse it (as we have done on a former occasion) on the ground that Walsh being a trespasser, and now out of possssion, could obtain no benefit therefrom.

CHERRY, L.J., concurred.

Solicitor for the prosecutor: *David A. Quaid.*
Solicitor for Mr. Ruxton: *A. E. Bradley.*

W. G.

CRONIN *v.* CONNOR (1).

K. B. Div.
1912.
Nov. 12, 19.

Trespass—Damage by cattle of owner of the soil to turf of owner of turbary rights—Dominant and servient tenement—Unreasonable user of natural rights by owner of servient tenement.

An action for trespass will lie for damage, caused by the cattle of the owner of the soil and freehold of a bog, to turf, cut and spread on a plot of such bog, (not fenced or divided from the residue) by the owner of other lands who enjoys the right to cut and save turf on such plot, where such cattle are depastured by the owner of the soil upon the bog without provision by him for the prevention of such injury by his cattle to the turf.

The depasturage of cattle by the owner of the soil of the servient tenement, without such provision against injury to the turf of the dominant tenant so situated, is, under such circumstances, a user by such owner of the soil of his natural rights which is unreasonable in relation to the dominant tenant as prejudicing the value of the incorporeal hereditament in the nature of a *profit à prendre* enjoyed by the dominant tenant, by endangering the saving of the turf.

CASE STATED for the opinion of the Court by Boyd, J., sitting as Judge of Assize for the hearing of civil-bill appeals at the Kerry Summer Assizes, 1912, in respect of an appeal against

(1) Before KENNY and WRIGHT, JJ.

K. B. Div. 1912.

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a decree of the County Court Judge of Kerry, awarding the plaintiff, Patrick Cronin, the sum of 15*s.* as damages for trespass by the cattle of the defendant, James Connor.

The defendant was formerly the tenant of a farm at Raccomane in the county of Kerry, on which there was a turf bog of about 16 acres in extent. The plaintiff was formerly the judicial tenant of a neighbouring farm on the same estate, and had, with other persons, a right of turbary upon the bog situate on the defendant's farm. Both plaintiff and defendant purchased their farms under the Land Purchase (Ireland) Acts, and the right of the plaintiff to turbary over a certain plot on the defendant's bog was expressly reserved to the plaintiff by the vesting order vesting the fee of his farm in the plaintiff, and also by the similar order vesting the fee of defendant's farm in the defendant. The defendant's bog adjoined a stream, and the defendant kept open a gap between the lowland and the bog on his farm, through which his cattle were allowed to enter and graze upon the bog and water at the stream. There was water besides the stream on the defendant's farm. The defendant's cattle injured the turf on the plot on which the turbary was reserved to the plaintiff when the turf was in course of saving. The plaintiff complained of the injury done by the defendant's cattle, and removed them from the bog while the turf was being saved; but the defendant insisted on putting the cattle back on the bog, and maintained his right so to do, contending that it was the plaintiff's duty to keep the cattle from injuring the turf, and that he, the defendant, had no duty in that respect. There was no physical boundary, except by "lock-spitting," between the plot on which the plaintiff had turbary and the rest of the bog in the defendant's occupation.

In the year 1906 a civil bill for trespass by the defendant's cattle on the plaintiff's turf was brought by the plaintiff against the defendant, and was heard and dismissed by the County Court Judge of Kerry, the late Judge Shaw, on the 16th October, 1906. On appeal to the Judge of Assize, at the March Assizes for the next year, Johnson, J., by decree dated the 18th March, 1907, reversed the decree of the County Court Judge, and, holding the defendant liable for the damage by his cattle to the plaintiff's turf, awarded the plaintiff damages on his claim.

At the March Assizes, 1908, a similar case of trespass between Daniel Sullivan, plaintiff, and James Pigott, defendant, was tried by Andrews, J., who decided against the plaintiff in the case. The grounds upon which that decision was based did not appear, nor was any evidence of the grounds given at the hearing of the present case before Boyd, J.; but it was stated by counsel for the plaintiffs at that hearing that the ground of the decision of Andrews, J., was that the owner or occupier of a bog was not liable for damages done by his cattle to spread turf belonging to the owners of turbary rights on the bog.

Having regard to this alleged difference of opinion between the learned Judges, Boyd, J., stated the present case upon the above facts, the question raised for the opinion of the Court being, "Is the defendant, as owner or occupier of land upon which the plaintiff is entitled to turbary, liable to the plaintiff for injury to the turf caused by defendant's cattle trampling the spread turf?"

J. F. Moriarty (with him *Serjeant Sullivan, K.C.*), for the defendant:—

The plaintiff contends that the defendant, as owner of the bog upon which the plaintiff has the right of turbary, is bound either to keep cattle off the plaintiff's turf, or to keep a herd to protect the turf from injury by the cattle. If the decision of Johnson, J., be right, the owner of a bog subject to turbary rights would have to keep his cattle off the bog so long as there was a reasonable likelihood that turf was being saved on the bog by the owners of the turbary rights. That proposes an additional burden upon the servient tenant; the owner of the servitude cannot do anything to alter the accustomed mode of enjoyment of the servitude so as to impose a greater burden upon the servient tenement (Gale on Easements, 8th ed., p. 495). The plaintiff's *profit à prendre* is analogous to a common of *estovers*. In Elton on Wastes (p. 10) reference is made to the following passage in Coke on Littleton (122*a*), which states the law in respect of the relation of the rights of the dominant and servient tenants. "If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture,

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CRONIN v. CONNOR.

estovers, or the like, this is a prescription or custom against the law, to exclude the owner of the soil; for it is against the nature of this word *common*, and it was implied in the first grant that the owner of the soil should take his reasonable profit there as it hath been adjudged. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terrae* from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there. And so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there." Here there is a *profit à prendre* of cutting turf, and that right cannot intend the exclusion of the owner of the soil; but that is what is sought by the plaintiff.

Bernard Roche and *P. D. Fleming*, *K.C.*, for the plaintiff:—

The grounds of the decision of Andrews in *Sullivan* v. *Pigott* (1) are not stated. It is admitted that a case, similar to the present case, and between the same parties, came before Johnson, J., in 1906. That case decided against the right of the defendant to send in his cattle when the cattle caused injury to the plaintiff's turf. That was a decision upon the same question raised here, and was between the same parties in respect of the same bog. It has not been challenged up to the present case, and no case was asked to be stated from it to this Court. The defendant is, therefore, estopped from now contending that he has that right against which the former decision in 1906 concluded.

The plaintiff has a *profit à prendre*, a servitude imposed upon the defendant's holding. That profit is expressly reserved to the plaintiff by both the vesting orders vesting the fee of the plaintiff's and defendant's farms. The plot assigned to the plaintiff upon the defendant's bog for the exercise of the plaintiff's right of turbary is not fenced off from the other portions of the defendant's bog. The plaintiff cannot fence that plot. If he did so, an action for trespass at the suit of the defendant would lie against him, for the ownership of the soil is in the defendant subject to the plaintiff's servitude. The plaintiff's right to turbary carries a right to spread the turf on the surface (La

(1) Not reported.

Touche's Furlong, vol. i., p. 341), but the plaintiff cannot prevent the defendant's cattle from coming in upon his turbary plot where the turf is spread. If the contention of the defendant be correct, the plaintiff would be compelled to keep someone, day and night, upon the plot while the turf was being saved, that is for a period of about six months; the defendant's cattle could go into the plot either by day or night. The defendant, however, has not the unfettered right to allow his cattle to wander at large over his bog. His rights over the bog are subject to the limitations imposed by his position as owner of the servient tenement subject to the plaintiff's servitude. The right of the servient tenant in respect of the servient tenement and in relation to the dominant tenement must be limited to a reasonable user. The authorities on *profits à prendre* show that the servient tenant must so use his tenement as not to disturb the enjoyment by the owner of the dominant tenement of his rights as such: *Boyle* v. *Holcroft* (1); *Fetherstonhaugh* v. *Hagarty* (2); *Fitzgerald* v. *Firbank* (3). Lindley, L.J., in his judgment in the latter case (p. 101) defines a *profit à prendre* as being something more than an easement, and as conferring possessory rights, for the infringement of which an action of trespass will lie. Is the defendant's action relative to the plaintiff's plot and turf a reasonable user of the servient tenement? The case stated by the learned Judge shows that the defendant keeps open a gap between the upland portion of his farm and the bog, through which his cattle go on to the bog; it is clear that the plaintiff has no right to fence his plot against the cattle so entering the bog. The passage cited from Gale on Easements (p. 495) does not apply to this case. Here the plaintiff has done nothing to prevent the user by the defendant of his farm; that user must in any event be subject to the plaintiff's rights reserved by the vesting orders. The plaintiff's rights in respect of the plot and in relation to the defendant's farm are analogous to the rights of two adjoining owners between whose lands there is no boundary fence (Halsbury, Laws of England, vol. ii., p. 340, paragraph 666; 1 Williams' Saunders, 559).

(1) [1905] 1 I. R. 245.
(2) 3 L. R. I. 150.
(3) [1897] 2 Ch. 96.

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Serjeant Sullivan, K.C., in reply :—

The plaintiff's right to protect his spread turf is admitted, but it is not admitted that he has a right to prevent the enjoyment by the defendant of his rights of ownership over the whole 16 acres because there is a small portion of the bog on which the plaintiff's turf is spread. If there be such a right as that, it must exist in every similar case, great or small, to a bog of 50 or 60 acres as well as to a small bog. That results in an intolerable burden upon the servient tenement. The exercise of his rights by the owner of the dominant tenement in relation to the servient tenement is equally subject to the principle *sic utere tuo.*

Nov. 19.

KENNY, J. :—

The circumstances of this case are of the simplest character. The defendant is the owner and occupier of a farm consisting of some 40 acres, of which about 16 acres are bog. The plaintiff, as the owner of an adjoining holding, is entitled to a right of turbary on a certain plot on this bog. The defendant's ownership of his holding necessarily involves his right of depasturing the bog with his cattle. Other adjoining owners or tenants have also turbary rights on the bog, and, unless by "lock-spitting," there are no fences to distinguish the plots on which the dominant owner exercises his rights or to prevent the defendant's cattle wandering throughout the bog. In 1911, in the course of their wandering, they were found on the plot where the plaintiff had cut his turf, and on which the turf so cut was then lying, in process of being saved. They damaged the turf to an extent which the County Court Judge has estimated at 15*s.*, and for which he gave a decree. The question we have to consider is whether, under the circumstances, the defendant was under an obligation to prevent his cattle invading the plaintiff's plot, or whether the duty of protecting his plot from invasion was cast upon the plaintiff. It is a surprising thing that there is no reported decision, one way or the other, on this net point—at least we have been referred to none, and I have been unable to discover any.

The litigation between the parties as to these bog rights is not, however, of quite recent date. In 1906, a civil bill

process, similar to the present, was brought by the plaintiff against the defendant, and was dismissed by the County Court Judge of Kerry, the late Mr. Shaw. That decision was reversed by Johnson, J., on appeal, and a decree for £2 given. The present County Court Judge, Mr. Browne, has followed the decision of Johnson, J., and given a decree from which the defendant has appealed, and in respect of which my brother Boyd has stated the present case. The latter calls attention to the fact that it was stated, by the defendant's counsel, that a similar case was tried before Andrews, J., in 1908, and that he decided against the plaintiff in that action. But that was a suit between other parties, and the grounds of the decision do not appear.

The rights of the parties in the present action stand thus. The owner of the soil of the bog, the defendant, has the right to graze his cattle over it, if there is herbage to be found on it. On the other hand, the plaintiff has the right to enter on the plot, which, presumably, was allotted to him for cutting purposes, and to cut and save his turf there and draw it away when saved. The right to cut must, from the nature of turbary, include the right to spread the turf and keep it on the bog for a reasonable time, and, in La Touche's Furlong, vol. i, page 341, that right is categorically stated. We have, therefore, two rights in the one subject-matter—the natural rights of the owner of the bog to the soil and freehold, and the incorporeal right in the nature of a *profit à prendre* vested in the plaintiff in respect of the same bog. Which right is to give way? The effect of the existence of the turbary right must necessarily be to cause some suspension or curtailment of the natural rights of the defendant as owner of the land, or at least some modification of his absolute right of ownership in the soil. It seems to me to be impossible to give effect to the full and absolute rights of each party in their respective properties. The plaintiff regards it as distinctly hard if he were compelled to herd the defendant's cattle and keep some person at all times on the bog to prevent their approach to his plot. Having no rights but those arising out of his incorporeal hereditament, he contends that he could not erect fences. On the other hand, the defendant regards it as a grievance that he should have the duty cast on him of looking after his cattle. Some cases have been cited to us, but none of them are directly in point.

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Two rights have to be reconciled. With respect to the servient tenement no new or additional burden should be imposed on it, while, at the same time, its owner must not, by the exercise of his rights, prejudicially affect, or detract from the value of, the *profit à prendre*. I think we can adjust the relations of the parties only by applying the test of what seems most reasonable under the circumstances, and, inasmuch as the plaintiff's whole turbary harvest, the cutting and saving of which is confined to a comparatively small portion of the year, would be imperilled if the defendant were entitled to allow his cattle to wander at large and without restraint over every portion of the bog, I am of opinion that it would be an unreasonable exercise of his rights of ownership if he were permitted to do so without making some sort of provision against injury to the plaintiff.

We shall therefore answer the question put to us in the case in the affirmative.

The plaintiff is entitled to the costs of the case and of this hearing.

WRIGHT, J., concurred.

Solicitor for the plaintiff: *James Egan.*

Solicitor for the defendant: *David M. Moriarty.*

C. N. K.

K. B. Div. 1912. Nov. 11.

HOLYWOOD URBAN DISTRICT COUNCIL, APPELLANTS; MARGARET GRAINGER, RESPONDENT (1).

Public Health—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 2; *Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19—"*Single private drain or sewer.*"

A pipe connected with the drains of several dwelling-houses, owned by different owners, and constructed by the owners of those dwelling-houses, on private ground, as, and used as, a common conduit to receive and carry away the sewage from those houses brought down by the connecting drains, is not a "sewer" vested in the sanitary authority under section 2 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), but it is a "single private drain" under section 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59).

(1) Before GIBSON and BOYD, JJ.

CASE STATED by the Justices of the Peace for the county of Down, sitting at Petty Sessions in the district of Holywood, on the 25th September, 1911.

The facts as appearing on the case stated were as follows:—At a Petty Sessions holden at Holywood, county Down, on the 25th September, 1911, the respondent Margaret Grainger was charged in a summons by the appellants, as complainants, in respect of a nuisance arising out of the defective condition of the house drains in or on premises situated at the dwelling-house of one John Maneely at High Street, Holywood. The appellants presented the case as the local sanitary authority for the district in which the alleged nuisance was situate. At the hearing it was proved that a nuisance existed from the stoppage in a pipe in the rear of the premises named in the summons, into which pipe the premises were drained. It was also proved that the house belonging to the defendant was one of a row of six houses fronting the High Street, in the town of Holywood, the property of five different owners, of whom the defendant was one, and that each of these houses was connected by a drain with the before-mentioned pipe, which ran along the rear of all the houses, and which was outside the curtilage of the defendant's premises. The common pipe admittedly carried away the sewage of the six houses and was undoubtedly defective, and it led into what was admitted to be a public sewer in a street intersecting High Street at the end of the row of houses in question. It was also proved that about fifteen years before the hearing water-closets were put into each of the houses, and that the common pipe along the rear of the houses had been then made at the joint cost of the owners of the houses and connected with the sewer. Prior to these sanitary alterations, each of the six houses had been supplied only with a privy. The common pipe, so built at the joint cost of the owners of the six houses, admittedly ran through private ground until connected with the public sewer in the intersecting street. There was some controversy before the Justices as to whether, in fact, the admittedly defective condition of the common pipe was or was not due to unskilfulness on the part of the appellants' officer in respect of a gully trap which the respondent alleged was constructed by the officer in the common pipe. The appellants

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denied that any such gully trap had been constructed by their officer. The appellants' solicitor contended at the hearing that the common pipe at the rear of the houses was a "single private drain" within the meaning of section 19 of the Public Health Acts Amendment Act, 1890 (1), which Act had been adopted by the appellants as the sanitary authority, and that the responsibility for its repair and maintenance was cast upon the owners of the houses, and cited in support of their contention *Bradford* v. *Mayor of Eastbourne* (2). The respondent's solicitor contended that this common pipe was in law a sewer, and cited the cases of *Jackson* v. *Wimbledon Urban District Council* (3), and *Wood Green Urban District Council* v. *Joseph* (4). The Justices held that there was not sufficient evidence to enable them to determine whether the admitted nuisance was in fact caused by the respondent; and also held that the common pipe at the rear of the six houses, which they found to be admittedly a receptacle for the sewage of the houses, and to run along private ground, was a sewer and not a "single private drain," and gave judgment against the appellants.

On the requisition of the appellants in the summons, and pursuant to section 2 of the Summary Jurisdiction Act, 1857 (1), the Justices stated a case for the consideration of the Court upon the facts above stated.

Williamson, for the respondent, as a preliminary objection, submitted that the finding of the Justices that the responsibility of the defendant for the nuisance had not been sufficiently proved removed all question of law in the case, and that therefore no case stated would lie: Summary Jurisdiction Act, 1857, s. 2 (5). [THE COURT decided to hear argument on the point whether the pipe in question in the case was a private drain.]

John M. Whitaker, for the complainants:—

The Justices state a definite finding of law—they find the common pipe running through private ground at the rear of the six houses, one of which is the house owned by the respondent,

(1) 53 & 54 Vict. c. 59.
(2) [1896] 2 Q. B. 205.
(3) 21 T. L. R. 479.
(4) [1908] A. C. 419.
(5) 20 & 21 Vict. c. 43.

and receiving the sewage of the six houses, is not a "single private drain" but a "sewer," and is vested in the appellants. At law, if this pipe be a private drain, the responsibility for its repair and maintenance is cast upon the owner—if it be a sewer the responsibility is cast upon the appellants as the local sanitary authority: Public Health (Ireland) Act, 1878 (1), section 2. The common pipe would undoubtedly be a sewer for which the appellants would be responsible under section 2 of the Public Health (Ireland) Act, 1878 (1), if the provisions of section 19 of the Public Health Acts Amendment Act, 1890 (2), had not been adopted by the appellants. Under the former Act a private drain could not serve more than one house; under the latter Act and section there can be a private drain where such drain serves more than one house, and the houses served are owned by different owners. The case of *Wood Green Urban District Council* v. *Joseph* (3) was decided on the facts. The House of Lords there decided on the absence of proof of the time at which the pipe there in question had been constructed.

Williamson, for the respondent:—

In *Wood Green Urban District Council* v. *Joseph* (4) the Court of Appeal decided that the drainage of two houses being drained together into a common pipe made the common pipe a sewer: see judgment of Collins, M.R., at page 191.

GIBSON, J.:—

In this case the Urban District Council of Holywood took proceedings against a lady as one of the owners of six houses in a street in respect of a nuisance arising out of the obstruction of a common pipe connecting with a sewer. Two points were raised before us: first, with reference to a statement by the Justices that the liability of the lady was left doubtful in proof, which, it was contended, was a decision on the merits excluding any question on which a case could be stated; and, secondly, whether this particular drain is a "single private drain" within section 19 of the Public Health Acts Amendment Act, 1890 (2). The argument was mainly addressed to this latter point,

(1) 41 & 42 Vict. c. 52.
(2) 53 & 54 Vict. c. 59.
(3) [1908] A. C. 419.
(4) [1907] 1 K. B. 182.

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which I shall deal with first. The case was argued on the assumption that, if this pipe was a "single private drain," the defendant would be liable for a nuisance from an obstruction therein caused by her act or default. My conclusion is based on that hypothesis accepted by counsel.

There is no word in the legal vocabulary which has been the subject of so much difference of opinion as the word "drain" as contradistinguished to "sewer." Both words are the subject of definition in the Public Health Act, 1875 (1), and the corresponding Irish statute, the Public Health (Ireland) Act, 1878 (2). Beyond question under both of these Acts a drain such as here described would not be a "private drain," the word "drain" being restricted to a drain serving one house only or premises within the same curtilage. The moment a drain is found to serve several houses under those Acts it becomes a "sewer," and is vested in the sanitary authority. Section 19 of the Public Health Acts Amendment Act, 1890 (3), was enacted to remedy the inconvenience arising under the sections of the earlier Acts. It is, however, restricted in operation to plurality of houses owned by different owners; a plurality of houses owned by the same owner is within the sections of the earlier Acts, and the drain, in that case, is, as before, a "public sewer." Here we have the case of houses owned by different owners; and one of the matters for our consideration is whether the drain, which I describe as the "parallel conduit," and which serves these houses, is a "single private drain." This parallel common pipe was, with the several house drains, constructed by the several owners at their joint cost fifteen years ago, to connect with the public sewer.

Apart from decision, and proceeding altogether on the language of the statute, it appears to me that, where separate drains play into a joint drain, constructed in private ground by owners of houses, to carry off the sewage brought down by the separate connecting drains, that common drain would be as much a "single private drain" as would any of the connecting subsidiary drains. That, in my opinion, is made tolerably clear by the language of section 19 of the Public Health Acts

(1) 38 & 39 Vict. c. 53, s. 4.
(2) 41 & 42 Vict. c. 52, s. 2.
(3) 53 & 54 Vict. c. 59

(Amendment) Act, 1890 (1). If a separate drain had been constructed to each house on the ground described as occupied by the joint drain, each such separate drain, under the Public Health (Ireland) Act, 1875 (2), section 4, or the Public Health (Ireland) Act, 1878 (3), section 2, would have been a "single private drain." Section 19 of the Public Health Acts Amendment Act, 1890 (1), was intended to deal with the case of several connecting drains emptying into a single drain constructed as here.

What is the effect of the case of *Wood Green Urban District Council* v. *Joseph* (4), so much relied on in argument? In that case there were several houses which drained into a pipe behind the houses, parallel to the main street, and that latter conduit was held not to be a "single private drain." The reason upon which the Court of Appeal based their decision, which was not followed by Lord Atkinson in his speech in the House of Lords, was that the subsidiary drains did not connect each house direct with the joint drain. The houses were semi-detached, and the drains of each pair of houses (which belonged to the same owner) drained into a common pipe connected with the joint drain parallel to the main street; such pipes common to the pairs of houses not being within section 19 of the Public Health Acts Amendment Act, 1890 (1), were "sewers" under the original Public Health Act, 1875 (2), section 4. The Court of Appeal considered that if there were a "sewer" at the beginning of the system and a "sewer" at the end there could not be intervening a "single private drain." The argument addressed to us by Mr. Williamson is founded upon a misapprehension of the language employed by Collins, M.R.

There is no need to discuss the decision of the King's Bench Division in that case. The House of Lords dismissed the appeal, not upon the ground taken by the Court of Appeal, but upon the ground that the receiving conduit was not shown to have been brought within section 19 of the Public Health Acts Amendment Act, 1890 (1). There was no evidence when or by whom it was constructed, or that it had been constructed after the houses were

(1) 53 & 54 Vict. c. 59.
(2) 38 & 39 Vict. c. 55.
(3) 41 & 42 Vict. c. 52.
(4) [1908] A. C. 419.

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built, and it received the drainage of undoubted sewers. In my opinion, the decision of the House of Lords shows that the drain here is a "single private drain," and in that view my brother Boyd concurs. None of the grounds upon which that decision is founded is present here.

Upon the second point, it would appear that the Justices found that there was not sufficient proof as to who was, in fact, responsible for the nuisance. As, however, they decided that this conduit was a sewer, they were not in a position to determine liability for obstruction in such conduit. If the drain was a private drain, the person owning it would be *prima facie* liable; if it was a public sewer, the public sanitary authority would be *prima facie* liable. But, even if it is a private drain, if the defendant can produce evidence that she is not responsible for the stoppage which, in fact, caused the obstruction, she would not be held responsible. It must, however, be recollected that the conduit was a joint construction, though only the defendant is sued. We shall, therefore, remit the case to the Justices to determine the extent of the obstruction and the responsibility of the defendant, if any, for the same.

BOYD, J., concurred.

The Court made the following order:—

Declare what is described on the map as a "nine-inch sewer" was in law a "single private drain" within section 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), and was not a "sewer" for which the appellants were responsible, and the Court doth remit the case to the Justices to proceed thereon, and to determine, having regard to the above declaration, whether the alleged nuisance in the said private drain was caused wholly or in part by the act or default of the defendant, including, if necessary in such determination the nature, cause, and exact position, so far as possible, of the obstruction causing the alleged nuisance.

Solicitors for the appellant: *R. E. M'Clean & Sons.*
Solicitors for the defendant: *J. M'Kee & Son.*

C. N. K.

OSBORNE, APPLICANT; TRALEE AND DINGLE RAILWAY COMPANY, RESPONDENTS (1).

Appeal.
1913.
Jan. 15, 20.

Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 60), *Schedule I* (3)—*Incapacity, at first total, and then partial—Reduction in weekly payments—Evidence—Jurisdiction of County Court Judge.*

A workman, at first totally incapacitated by an accident for the consequences of which the employers accepted liability, was paid by them half wages for some months, when they sought to reduce the weekly rate of payment on the ground that total incapacity had ceased. The workman applied for arbitration, and was the only witness examined before the County Court Judge. He proved that he had tried to get employment, and failed; and was admittedly not actually in any employment at the time of his application. He did not, however, give any estimate of what would be the value of his services if employed. No evidence of any kind was adduced by the employers. The County Court Judge awarded the applicant, until further order, a weekly sum which was equivalent to half the wages he was earning up to the time of the accident.

Held, that the County Court Judge was within his jurisdiction in making the award, and that it should be affirmed.

APPEAL by the employers from the award dated the 13th November, 1912, of the County Court Judge of Kerry (His Honour D. F. Browne, K.C.), awarding the applicant 16*s.* per week until further order, in respect of an injury sustained by him while in their employment as an engine-fitter. The facts were not in dispute, and the employers, treating the applicant's incapacity as at first total, paid him half wages, viz., 16*s.* a week, from 23rd December, 1911, the date of the accident, down to the 30th August, 1912, when they claimed to be entitled to reduce their weekly payments to 10*s.*, which they alleged would be sufficient to discharge their liability under the Act for the applicant's partial incapacity to work,

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

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resulting from the accident. They refused to continue any larger payment; and the applicant made his application for arbitration, and the respondents served notice offering 10*s.* a week, and to submit to an award for that weekly amount.

The applicant was the only witness examined, and his evidence as reported by the learned Judge was as follows:—

"I am an engine-fitter. I was employed by the respondents, the Tralee and Dingle Railway Co. My wages were 32*s.* per week. While in the respondents' employment on the 23rd December, 1911, I was working at a crane, lifting a boiler, when my left hand was caught between two cog-wheels of the crane. My hand was crushed between the wheels; the second finger of my left hand is gone from the second joint; the first finger is stiff, and I cannot bend it. [The learned Judge stated that the applicant showed him applicant's hand, the appearance of which corroborated applicant's evidence.] After the accident I came to Dublin, and attended the Richmond Hospital for three months, during which time I was under treatment for injuries. When I ceased to attend the Richmond Hospital, I applied to the respondents to give me light work to do, such as I was then fit for; but they would not give me work. I also applied for light work at the Inchicore Works of the Great Southern and Western Railway Co., where I had been apprenticed, but I failed to get work from the Great Southern and Western Railway Co. From the 23rd of December, 1911, to the 30th of August, 1912, I received weekly payments of 16*s.*, in respect of the injury received, being payments at the rate of half my weekly wages up to the time of the accident."

No evidence was given on behalf of the employers.

The learned Judge reported further: "I found on the above evidence that personal injury had been caused to the applicant by an accident arising out of and in the course of his employment; that permanent partial incapacity resulted from such injury; and I ordered that compensation should be paid by the respondents to the applicant at the rate of 16*s.* per week, from the 30th August, 1912, until further order."

Serjeant Sullivan, K.C., and *Timothy Sullivan*, for the appellants :—

The discretion of the learned County Court Judge was in this case controlled by the first schedule to the Workmen's Compensation Act, 1906. There are three maxima, none of which can be exceeded in fixing compensation for partial incapacity—first, £1 per week; secondly, half the wages earned at the time of the accident; thirdly, the difference between those wages and what the workman could earn at the time of the award in some suitable employment. We contend that it is patent that the consideration of the learned Judge was not directed to the third limit. There was no evidence before him what sort of work the applicant could do, or what the value of that work would be. He, therefore, had not the figures which would have enabled him to work out the sum in arithmetic which the statute says shall govern the compensation. We were not bound to offer such evidence. It might be otherwise if an award had originally been made on the basis of total incapacity, and the employers afterwards came before the Court to reduce the amount on the ground of partial recovery. But here the applicant comes into Court seeking an award, and he is bound to come prepared with evidence not only of his title to compensation, but of the amount he is to be given. [Counsel cited and commented at length on *Radcliffe* v. *Pacific Steam Navigation Co.* (1); *Proctor and Sons* v. *Robinson* (2); *Cardiff Corporation* v. *Hall* (3); *Bevan* v. *Energlyn Colliery Co.* (4).]

James A. Rearden, for the respondent :—

The County Court Judge had all the facts before him. None of them seems to have been disputed. He inspected the engine-fitter's mutilated hand; and he heard from the workman how, immediately after leaving hospital, he went in search of work from the appellants, amongst others, and could not get it. It is impossible to suggest any rational ground for disturbing the award: *Bryce* v. *Connor* (5). This Court is bound by the Judge's finding: *Kenny* v. *Harrison* (6).

(1) [1910] 1 K. B. 685.
(2) [1911] 1 K. B. 1004.
(3) [1911] 1 K. B. 1009.
(4) [1912] 1 K. B. 63.
(5) 7 F. 193.
(6) [1902] 2 K. B. 168.

Appeal.
1913.

OSBORNE
v.
TRALEE AND DINGLE RY. CO.

Jan. 20.

THE LORD CHANCELLOR:—

The applicant is a fitter, and was working for the railway company for some time not definitely stated. He was engaged at a crane, lifting a boiler, on December 23rd, 1911, and his left hand got caught between two cog-wheels of the crane. He was severely injured. There is no challenge about the injuries on the part of the railway company. The man had to attend Richmond Hospital at Dublin for three months, and as soon as he could he applied for light work from the respondents, but they did not agree to give it. He was disappointed, also, in applying to another railway company in Ireland. There was a claim under the Workmen's Compensation Act, 1906, and the matter was arranged by the respondents agreeing to pay the weekly sum of 16*s.*, half the applicant's wages. That was carried out up to August 30th, 1912. Then the respondents endeavoured to reduce the 16*s.* to 10*s.* weekly; but the applicant would not agree to the proposal. Osborne brought the case before the Court, and in a notice served by the respondents they admitted their liability in respect of a partial incapacity, and their readiness to submit, subject to legal conditions, to an award of 10*s.* weekly, payable to Osborne. The case was heard in due course by His Honour Judge Browne, the County Court Judge of Kerry. Osborne alone was examined as a witness, according to the Judge's note of the evidence. The applicant gave evidence that he was attended at the Dublin Richmond Hospital for three months, and that after that he applied to the respondents for light work, for which he was, in his opinion, then fit; but the respondents did not employ him, and another railway also refused. In that state of affairs the Judge found that permanent partial incapacity had been caused to Osborne, arising out of and in the course of his employment; and he ordered that compensation should be paid by the railway company to Osborne at the rate of 16*s.* per week, from August 30th, 1912, "until further order."

It was argued in this Court, on the part of the railway company, that Judge Browne had no jurisdiction to make the order now the subject of appeal. That is the important legal question raised in the case. We heard full arguments from the counsel

on both sides; and we had the advantage of the English Court of Appeal's decisions in the three cases so much discussed—*Radcliffe* v. *Pacific Steam Navigation Co.* (1), *Proctor & Sons* v. *Robinson* (2), and *Cardiff Corporation* v. *Hall* (3). The learned Judges, who sat together on the three occasions, were the late Master of the Rolls (Sir H. H. Cozens Hardy), Lord Justice Fletcher Moulton, and Lord Justice Buckley.

In this case I fully agree with the course taken by Judge Browne. No evidence was offered to him on the part of the railway company, and, as I said, no one except Osborne was examined as a witness. On the facts of the case it was, in every sense, in the jurisdiction of the Judge to make the order now the subject of discussion before this Court. His order, therefore, as at present standing, subject, as stated expressly, "until further order," is that Osborne should be paid 16*s*. weekly as from August 30th, 1912. The appeal, therefore, must be dismissed.

HOLMES, L.J.:—

My difficulty in this appeal is to ascertain the view of the facts and the law taken by the County Court Judge. The applicant, in December, 1911, met with an accident to his left hand arising out of his service as engine-fitter in the respondents' employment. He received hospital treatment for the injury for three months, during which he was paid by the respondents 16*s*. a week, being the half of his wages, and the maximum to which he would be entitled for total incapacity for work. He then ceased to have hospital treatment, and applied to the railway company to give him light work, which they declined to do; but they continued to pay him 16*s*. weekly down to the following August. This payment was then stopped, and the applicant, in September, applied for arbitration, alleging that he was totally incapacitated for work by the accident. The respondents, in their reply, admitted that he had been totally incapacitated down to the 7th September, at which date his incapacity became only partial, for which they were willing to pay 10*s*. weekly.

(1) [1910] 1 K. B. 685.
(2) [1911] 1 K. B. 1004.
(3) [1911] 1 K. B. 1009.

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The applicant alone was examined before the County Court Judge, and in his oral evidence, as reported, nothing is to be found to show that there was any change in his condition from what it had been during the many months in which the respondents admitted that he was totally incapacitated. Therefore, if the Judge had found that such incapacity continued, there could be no objection to his award; but he expressed the opinion that the incapacity was partial, although permanent. I can only account for this by the fact that the Judge, who, according to his report, had himself examined the hand, found nothing wrong, save that the first finger was stiff, and the second was gone from the second joint. There can, I think, be no doubt that the Judge was justified in acting on his own observation; and I find no fault with his finding based thereon. But I must assume that he had in his own mind some definite kind of work obtainable in the neighbourhood of the applicant's residence, and for which wages at a certain rate were payable. This is the point at which my difficulty comes in. Three things are to be observed in fixing compensation for partial incapacity—it must not exceed one half of the wages payable before the accident; it cannot be more than £1 a week; and the weekly payment shall in no case exceed the difference between the average weekly earnings before the accident and the average amount which the workman is earning, or is able to earn, in some suitable employment after the accident. No question arises as to the first and second of these conditions, but I am unable to learn from the report anything about the third.

No doubt, the average weekly amount capable of being earned after the accident does not admit of exact calculation; but if the kind of work which the applicant can do is ascertained, a reasonable estimate of it can be arrived at. It may be that the Judge held that the work for which the applicant was suited would bring him less than 16*s.* a week, in which case the award would be free from all objection. It may be that he formed the opinion that the applicant could obtain work at higher weekly wages than 16*s.*; but that, as this had not been proved by the respondents, the latter could not take advantage of it. This seemed to me to be the argument of the workman's counsel; but in the circum-

stances of the present case, I doubt its soundness. Or, there is possibly a third alternative—that the provisions of sub-section 3 of the first schedule of the Act of 1906 were overlooked in fixing the compensation.

For these reasons I would have preferred that (as has been done in other cases) the award had been sent back to the Judge for a further report—a course which would not injure the applicant, as the respondents are willing to consent to pay the compensation already awarded until the question is finally settled. At the same time I do not dissent from affirming the order, as I understand that the respondents will not be precluded thereby from raising the matter in dispute by a further application to the Judge.

CHERRY, L.J.:—

The applicant in this case, on the 23rd December, 1911, met with an accident in the course of his employment which, it is admitted, entitled him to compensation under the Workmen's Compensation Act. The respondents paid him, from that date until the month of September, the sum of 16*s.* a week, being half the wages he was in receipt of prior to the accident, and the maximum amount which he was entitled to receive under the Act, in the case of total incapacity to work. It is not disputed that he was totally incapacitated from work up to the 7th September, 1912, but as from that date the respondents contend that his total incapacity ceased, and that he was only entitled to receive payments on the basis of a partial incapacity. They tendered him compensation as from that date at the rate of 10*s.* a week, which he refused to accept. He then applied to the County Court Judge to fix the amount of his allowance per week, claiming to be still totally incapacitated. At the hearing of the case, he admitted that he was now able to do light work, but said that he was unable to obtain it. He said that he had applied to the respondents and to the Great Southern and Western Railway Company for employment such as he was fit to do, but that he had been refused employment by both companies. No evidence was offered on behalf of the respondents and no attempt was made by them to prove that work of any kind was available for him. Upon these

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facts the County Court Judge found that permanent partial incapacity for work had resulted from the accident, and awarded compensation at the rate of 16*s.* a week, "to continue," in the words of the order, "during *the total or partial* incapacity of the said William Osborne for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the above-mentioned Act."

From this order an appeal has been taken, and by their notice of appeal the respondents apply for an order that the decision may be reversed and that the case may be remitted to the County Court Judge to reconsider his decision, and to ascertain by what sum the weekly payments should be reduced in view of the fact that the applicant's total incapacity for work has ceased, and that he is now only partially incapacitated.

The appeal seems to have been originally based upon the assumption that an allowance for partial incapacity must necessarily and, as a matter of law, be less than an allowance for total incapacity. But this assumption is entirely without foundation. It is true that an allowance for partial incapacity is subject not only to the two limitations which apply in the case of total incapacity, viz., that it must not exceed £1 a week, and must not exceed one-half of the average weekly wages which the workman was earning prior to the accident, but also to a third limitation, viz., that it must not exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident. In a case, however, like this one, where the uncontradicted evidence is that the workman is earning nothing, and can earn nothing at present, the County Court Judge has full jurisdiction, according to his discretion, to allow him the same amount as he would be entitled to receive on the basis of total incapacity; and we should have no jurisdiction, even if we had the desire, to interfere with his discretion in this respect. No injustice is thereby done to the employers, for if, at any time, they are in a position themselves to offer the workman any work he is able to do, or if they can show by legal evidence that such work is available under some other employer, they can apply to the County Court Judge to

reduce the amount of the weekly payments. I can see, therefore no reason why the award of the County Court Judge should be reversed merely because he has fixed the amount of the compensation during partial incapacity at the same rate as the workman was receiving during total incapacity.

Counsel for the respondents, however, recognizing the force of these considerations, abandoned, at the hearing before us, the claim to have the amount of the allowance reduced as a matter of right. They then put forward the contention that the County Court Judge had held no inquiry into the difference between the wages which the applicant was earning prior to the accident and what he can now earn, and they asked to have the case sent back to him to hold such an inquiry. The simple answer to this application is, that the County Court Judge has held this inquiry. The only evidence that was given before him was directed to this very point, and, if believed, established that the third limitation of the amount in this case has at present no application, inasmuch as the applicant has not been able to obtain any work, and there is no evidence of what he is capable of earning if he did. It was not the fault of the applicant or of the County Court Judge that the respondents called no witnesses and gave no evidence; and it would be, in my opinion, most unfair to them both for us now to direct a new inquiry to enable the respondents to mend their hand and offer evidence. If they have evidence available, they can serve notice to have the amount of the allowance varied; but, until they take this course, I see no reason why the award of the County Court Judge should not be enforced.

Solicitor for the applicant; *T. J. Liston.*
Solicitor for the respondents: *Joseph Mangan.*

W. G.

WHALEY *v.* THE GREAT NORTHERN RAILWAY COMPANY (1).

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April 29, 30. May 1. June 26.

Appeal.

Nov. 20, 26. Dec. 17.

Local government—Rating—Land used as a railway—Valuation list—Rate based on valuation—Finality of rate—Towns Improvement (Ireland) Act, 1854 (17 & 18 *Vict. c.* 103), *sects.* 60, 62—*Valuation Act*, 1852 (15 & 16 *Vict. c.* 63), *sects.* 12, 27.

An urban council pursuant to sect. 60 of the Towns Improvement (Ir.) Act, 1854, struck a rate on hereditaments and premises the property of a railway company, based upon the final valuation list delivered by the Commissioner of Valuation. Certain premises, alleged by the railway company to be "used as a railway," and as such liable to be assessed in the proportion of one-fourth part only of their net annual value under sect. 62 of the Act of 1854, were included in the said valuation list under the heading "buildings" and not under the heading "railways, fisheries, &c.," and were accordingly assessed by the urban council at their full value. No objection was made by the railway company to the valuation list prior to the striking of the rate, and no appeal was taken by them either against the valuation or the rate. The urban council having sued the railway company for the disputed rates—

Held, by the King's Bench Division (Palles, C.B., and Kenny, J.; Wright, J., *diss.*) and by the Court of Appeal, that the plaintiff was entitled to recover the full rate.

Held, by Palles, C.B., and the Court of Appeal, that the description in the final list delivered by the Commissioner of Valuation was conclusive that the hereditaments were not a "railway" or "lands used as a railway," and that the urban council were bound accordingly to rate them at their full value.

Per Kenny, J.: A mistake in the description of the hereditaments could only have been corrected (1) by an objection lodged with the Commissioner of Valuation; (2) by an appeal from the Commissioner; or (3) by an appeal from the rate.

NEW TRIAL MOTION.

The action was brought by the plaintiff, as rate-collector of the Urban District Council of Omagh, to recover £62 0*s.* 9*d.*, the balance alleged to be due by the defendant of a sum of £287 15*s.* 10*d.* assessed by the council on hereditaments and

(1) In the King's Bench Division before PALLES, C.B., and KENNY and WRIGHT, JJ.

premises of the defendants at Omagh, for the year ending the 31st March, 1911, under sect. 60 of the Towns Improvement (Ireland) Act, 1854, which section was made applicable to the town of Omagh by sect. 41 of the Local Government (Ireland) Act, 1898. Certain of the premises so rated were entered in the column of the valuation list prepared by the Commissioner of Valuation in force at the time of the assessment as "Railway," and were assessed, under sect. 62 of the Towns Improvement Act of 1854, in the proportion of one-fourth part only of their net annual value; but other of the premises, described as "Omagh station, part of; stationmaster's house; corn store; refreshment room; Market Street station; engine-shed; and turn-table," were inserted in the valuation list not under the heading of "railways, fisheries," &c., but under that of "buildings," and were assessed in the full amount of the valuation. No objection was taken by the defendants to the valuation list, and they entered no appeal against either the list or against the rate assessed. The defendants paid, and the plaintiff received, the sum of £225 15*s.*, on account of the total amount of the rates, and the defendants further paid into Court a sum to meet the rates in respect of the premises in dispute, calculated in the proportion of one-fourth part of their net annual value.

The action was tried before Mr. Justice Dodd, on the 19th and 20th Dec., 1911, when judgment was entered for the defendants; and the plaintiff now moved to set aside this judgment, and that judgment for the full sum of £62 0*s.* 9*d.*, should be entered for him.

Henry, K.C., *Chambers, K.C.*, and *Murnaghan* for the plaintiff.
Ronan, K.C., *Gordon, K.C.*, and *Hunt*, for the defendants.

The arguments of counsel on both sides are fully referred to in the judgments of the Court.

June 26.

WRIGHT, J.:—

The first and main reliance of the plaintiff is on the description of the premises in question in the valuation lists prepared by the Commissioner of Valuation, and forwarded to the local authority.

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These lists are undoubtedly the basis upon which the rating authority acts; the duty of the County or Urban District Council is to make a rate *according to the revised list* sent to them by the Commissioner of Valuation: *vide* Article 37 (*n*) of Adaptation of Enactments Order, 1899. The form to be used by the Commissioner was prescribed by the schedule to the Valuation Act of 1852 (15 & 16 Vict. c. 63), but for this a new form was substituted by the schedule to the Act of 1860, 23 & 24 Vict. c. 8, with power to the Treasury (by sect. 6) to alter the form from time to time as they might think fit. It has been stated that the present form, sanctioned by the Treasury, has been in use since 1899. A duty is, by the Valuation Acts of 1852 and 1854, imposed upon the Commissioner of "distinguishing" in the lists all such hereditaments as are of a public nature or used for charitable purposes, or for the purposes of science, literature, or the fine arts; and from such a determination or statement by the Commissioner of the nature or user of such premises, an appeal was given to Quarter Sessions, with power to state a case for the Superior Court. In *Moore* v. *Boyd* (1) this Court has decided that the decision of the Recorder that buildings are used for public purposes is a judgment *in rem* as to the nature of the user of such hereditaments, and is "binding and conclusive on all parties to all intents and purposes whatsoever," in the words of sect. 23 of the 15 & 16 Vict. c. 63. But as regards all other classes of premises, no such duty is imposed on the Commissioner. The list prepared in his office sets out the valuation and area, and purports to give a description of each tenement or rateable hereditament, so as presumably to show that it comes within the enumeration of rateable hereditaments specified in sect. 12 of the Act of 1852, 15 & 16 Vict. c. 63. Any person aggrieved by reason of the valuation of any hereditament, or by reason of any inaccurate statement of area or inaccurate description of the hereditament, may send in a written complaint, which the Commissioner may himself investigate, and may, if he thinks it necessary, employ a valuator or surveyor to assist him (sects. 19 and 20 of the Act). In addition

(1) [1911] 2 I. R. 579.

an appeal to Quarter Sessions from the valuation is given to any person aggrieved by sect. 22. Sect. 23 deals with the hearing of such appeal; power is given to the Court "to hear all parties who may be directly or indirectly interested in the cause of the appeal, and to make such order thereon as to the Court shall seem fit." On the hearing the valuation lists signed by the Commissioner of Valuation are to be deemed *prima facie* evidence of the correctness of the valuation until the contrary is shown, and, as already stated, the determination of the Court in or concerning the premises is declared to be "conclusive and binding on all parties, to all intents and purposes whatsoever." That is the statutory declaration of the force and operation of the decision of a Court on the hearing of a valuation appeal, and *Moore* v. *Boyd* (1), already quoted, does no more on this point than give effect to the express words of the statute. With the preparation and transmission of the lists to the local bodies the function of the Commissioner, generally speaking, comes to an end; and I may here quote from the judgment of Mr. Justice Holmes, in the *Dublin Cemeteries Committee* v. *Commissioner of Valuation* (2):— "In preparing those lists the liability to rates of the premises included does not arise directly at all, and those lists when finally settled are not conclusive as to the rateability of such premises." They are conclusive as to the amount of the valuation, but they do not impose or declare liability. In the words of FitzGibbon, L.J., in the *Trinity College Case* (3): "The Valuation Acts were not taxing Acts. They made the tenement valuation the basis of taxation where they applied, they defined 'rateable hereditaments,' but they did not rate or empower any local authority to rate, property otherwise exempted or not otherwise rated." In fact, what are these lists but documents prepared in a Public Department by the staff of the Commissioner, and signed by him? It is wholly and purely departmental work; nothing in the nature of a determination or decision as to the character of the premises (I am speaking of course of premises other than those used for public or charitable or scientific

(1) [1911] 2 I. R. 579.
(2) [1897] 2 I. R., p. 167.
(3) 2 New Ir. Jur. Rep. at p. 292.

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purposes, &c.). It is no part of his duty, it is not within his power, to decide whether they are lands used as a railway, and therefore assessable only to the extent of one-fourth, or not.

To turn to the list in the present case, which is in the form approved of by the Treasury, and in general use, there are separate columns for "lands" and "buildings," and another for "railways, fisheries, tolls, half-rents," &c. The figure £382 appears as the rateable annual valuation of "buildings" described as "Omagh Station, part of, and stationmaster's house." By sect. 62 of the Towns Improvement Act, 17 & 18 Vict. c. 103, "all lands used as a railway constructed under any Act of Parliament for public conveyance shall be assessed and liable in the proportion of one-fourth part only of the net annual value of such lands." If the list, as prepared and forwarded, is binding and conclusive, lands coming within sect. 62 of the Act of 1854 (17 & 18 Vict. c. 103) are assessed and rated at their full annual value, as the result of a misdescription, instead of at one-fourth of it, in violation of the public statute. I can find nothing in the nature of the document, nor in the language and general meaning of the several Valuation Acts, to give it the binding and conclusive force contended for by the plaintiff. In my opinion, the Commissioner has, as regards these premises, no power or jurisdiction so to decide; and further, in my opinion, the statement of the character or description of the premises is not a decision having the effect of contravening or over-ruling an Act of Parliament, and the case of *Moore* v. *Boyd*(1), already cited, where the binding force and effect of a decision of a Court of law, on a question properly brought before it, and within its jurisdiction, is laid down, has no application to a statement or description appearing in the lists emanating from a department such as the Valuation Office, and the defendants are not precluded from showing in this action the true nature and character of these hereditaments; that they are wrongly described as "buildings" in the valuation lists; that they consist wholly or in part of lands used as a railway within sect. 62 of the 17 & 18 Vict. c. 103, and should be rated in accordance with that

(1) [1911] 2 I. R. 579.

section; and as under that sect. (62) of the 17 & 18 Vict. c. 103, power is given to proceed by action for the recovery of any assessment under the Act, so, in my opinion, the person rated can set up the invalidity of the rate by way of defence to the action (*vide New Ross Case* (1), judgment of Gibson, J., at p. 164), on the ground that it is a case of want of jurisdiction, not an exemption.

By section 29 of the Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109), for the first time an appeal to Quarter Sessions against a rate is given to a person aggrieved by such rate, and in the present case no appeal against the rate was taken. From 1854, the date of the Towns Improvement Act, to 1871, a period of seventeen years, no power of appeal against the rate existed. The amount of the rate could, during that period, have been sued for and recovered by action under sect. 62 of 17 & 18 Vict. c. 103, and during all that time, in my opinion, the validity of the rate could have been raised by defence to the action. Has this right been impliedly taken away by the giving of an appeal under sect. 29? I am clearly of opinion that it has not. That the right of appeal is a further remedy, and, ordinarily speaking, is the proper and more convenient remedy, is obvious, and the chairman has full power on the hearing finally to determine the matter of the appeal, and to make such order as to him shall seem meet, which order shall be binding and conclusive upon all parties, but I am unable to see any grounds for holding that an appeal is made the sole and exclusive remedy.

If I am right in the foregoing conclusions, it only remains to apply them to the facts proved in evidence. Some of the premises here rated on the full valuation consist of lands used wholly as a railway which under the statute (17 & 18 Vict. c. 103, sect 62) ought only to have been rated on one-fourth; some include portions of land used as a railway; and as to others it is a question to be decided on the facts proved in evidence whether they are part of the railway system or not. This is the case more particularly as to two goods sheds. As to the turn-table, it is necessarily wholly used as a railway. It is rated on the whole valuation. As to the premises upon which the figure £287 has

(1) 30 L. R. Ir. 160.

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been placed, this is probably a composite item, made up partly of lands used as a railway, and partly of lands not so used. This Court cannot break up or separate one part of this figure from the rest; it cannot say how much has been properly rated, and how much has not; it cannot distinguish the good part from the bad.

Wright, J.

The result, in my opinion, is that the rate as a whole is bad, and that plaintiff's action fails.

KENNY, J.:—

The question for determination in this case is, whether it is open to the defendants in an action brought for recovery of the amount of a rate assessed upon premises not distinguished in the valuation lists or in the rate-books as a "railway" or part of a "railway" or "land used as a railway" to contend that such premises are in reality portion of their railway and consequently rateable only to the extent of one-fourth part of the net annual value thereof. The defendants have been also rated in respect of other premises admittedly forming portion of their line of railway, such premises being described in the valuation lists as "railway," and the valuation being inserted in the column dealing with "Railways, fisheries, &c." The rate upon these latter premises is made on the one-fourth part only of the valuation, and no question arises with reference to the legality of such rate.

In the case of the premises the rate on which is the subject-matter of this action, they are described in the column of the valuation list headed "Description of tenement" as "Omagh Station, part of," "stationmaster's house," "corn store," "refreshment room," "Market Street station," "engine-shed," and "turntable, part of Omagh Station," and the amount of the valuation of each is inserted in the list,—not under the heading of "Railways, fisheries, &c.," but under the general heading "Buildings." The rate has been struck on the full amount of the valuation.

No objection was made and no appeal was taken to these lists pursuant to the Valuation Acts, and the rating authority struck their rate in accordance with the lists, treating the premises described as "railway" as assessable only to the extent of one-

fourth, and treating the other premises not so described as hereditaments rateable on the entire valuation.

No appeal was taken from the rate so struck on these latter premises, the defendants apparently choosing to wait until an action for the amount of the rate was brought, and, accordingly, their contention is that they are entitled by way of defence in this action to now show that portion, if not all, of these premises is in fact "railway," or "land used as a railway," in respect of which they should have been rated only to the extent of one-fourth of the valuation. Mr. Justice Dodd yielded to that contention, held the rate to be bad, and gave judgment for the defendants.

Two questions, intimately connected, present themselves for consideration in this controversy, viz.: (1) Whether the uncontroverted and unappealed valuation list amounts to such a determination of what premises are to be regarded as "railway" and what are not to be so regarded, as to conclude the plaintiff and defendants in an action brought for the recovery of the rate; and (2) whether, if the valuation lists in these circumstances be not conclusive, the fact that the rate itself was unappealed from deprives the defendants of any right now to reopen the question. In considering these questions it is necessary to refer shortly to the Valuation Acts of 1852 and 1854, the Towns Improvement Act, 1854, the Revision Amendment Act, 1860, and the Irish Local Government Acts of 1871 and 1898.

By the 12th sect. of the Valuation Act of 1852 an enumeration is given of the hereditaments that are to be deemed to be rateable. That enumeration specifically includes "railways." The 15th sect. (repealed by sect. 1 of the Valuation Act, 1854) provides that the Commissioner of Valuation is to distinguish all hereditaments of a public nature or used for charitable or other specified purposes, and that all such hereditaments *so distinguished* shall, so long as they fulfil the conditions mentioned in the section, be deemed exempt from all assessment to poor rate, grand jury, and county rates. Section 19 enables any person aggrieved by the Commissioner's valuation or by reason of any inaccurate statement of area or inaccurate description of any rateable hereditament contained in the valuation lists or any other cause whatsoever, to

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give notice in writing setting forth the grounds of such grievance, and such notice is to be forwarded to the Commissioner of Valuation, who, under the 20th sect., is to inquire into the subject-matter of it and alter and amend the lists if necessary. The 22nd sect. gives to an aggrieved person an appeal to Quarter Sessions against the valuation contained in such list. The 23rd sect. provides that the determination of Quarter Sessions on such appeal shall be conclusive and binding on all parties to all intents and purposes whatsoever. The 25th sect. makes provision for final valuation lists being made out by the Commissioner of Valuation, and the 26th and 27th sects. enact that all county or grand jury rates and rates made by any town council shall be levied according to the valuations contained in such final lists.

In 1854 an amending Valuation Act was passed. It repealed the 15th sect. of the Act of 1852, but re-enacted (sect. 2) in almost similar terms the provisions contained in it under which the Commissioner of Valuation was to distinguish all hereditaments of a public nature or used for charitable purposes, &c., which hereditaments, *so distinguished,* were, so long as they continued to be of a public nature and occupied for the public service or used for the purposes therein mentioned, to be deemed exempt from all assessment. By sect. 5 revised valuations were provided for.

The Act of 1852 contained a form of valuation list which was to be signed by the Commissioner—but by a subsequent Act—the Revision Amendment Act of 1860 (1)—these lists were to be in the form specified in the schedule thereto or in such other form as the Treasury should from time to time approve, and it appears that the form now in use is one that was approved of by the Treasury in the year 1899 pursuant to this section. It contains, *inter alia*, separate columns headed: "Streets and occupiers." "Description of tenement," "Lands," "Buildings," and "Railways, Fisheries, tolls, half rents," &c. As I have already stated, the subject-matter of the disputed rating in the present case is not placed under the last-mentioned heading, but under the heading "Buildings."

(1) 23 & 24 Vict. c. 4, sect. 6.

The Local Government (Adaptation of Irish Enactments) Order, 1899, by clause 37 (N.) provides that the county and urban district council are to make their rates according to the revised list sent to them by the Commissioner of Valuation. They had no alternative but to adopt those lists as the foundation for their rates; and, if they were inaccurate in any part, such inaccuracy it seems to me could be challenged only by an appeal against the rate.

With reference to the effect of a decision of Quarter Sessions, where an appeal was taken from the valuation pursuant to the 22nd and 23rd sections of the Act of 1852, an important decision of this Court was recently pronounced in the case of *Moore* v. *Boyd* (1), in which this Divisional Court, constituted as it now is, held that a decision of the Recorder of Dublin,—on appeal from the valuation,—that certain hereditaments were used for public purposes, was a judgment *in rem* as to the nature of the user, and binding on all parties to all intents and purposes whatsoever. In his judgment in that case the Lord Chief Baron exhaustively considered the objects and effects of the Valuation Acts, and the leading authorities dealing with them. At page 590 of the report will be found a very clear and simple exposition of the relations between the valuation authority and the rating authority. The Lord Chief Baron says:—"I agree with Lord Justice Holmes that they"—the Poor Law Acts and the Valuation Acts—"have now become part of one and the same code,—the Valuation Acts supplementing the Poor Law Acts and providing machinery for enabling the Poor Law rating authorities referred to in it to perform the duties imposed upon them by the Acts authorizing the rates, and thus incorporating them in the Rating Acts. The Valuation Acts not only relieve the rating authorities from the responsibility, but they deprive them of the power, of themselves making valuations of the rateable hereditaments. They impose this duty upon a Commissioner, who is to supply his valuation to the rating authorities; and the power of these bodies to rate is cut down to rating *according to the valuations* so supplied."

The Chief Baron goes on to observe that the rating authority

(1) [1911] 2 I. R. 579.

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cannot be responsible for an error committed by a wholly different authority; and therefore the lists returned to the rating authority must be such as can safely be acted upon by them as the basis of a valid rate; and at the close of his judgment he suggests as still open the question whether the mere "distinguishing" by the Commissioner himself under the Act of 1854 does or does not in itself amount to a judgment *in rem*.

That judgment was one upon the construction of the Act of 1854 which provided for certain exempted hereditaments being distinguished by the Commissioner in his valuation lists, and was not a decision on the first question we have to consider here as to the binding effect of the Commissioner's determination with reference to the character of the rateable hereditaments mentioned in the 12th section of the Act of 1852.

In the year 1854 the Legislature made provision for the rating of occupiers of town premises by the Towns Improvement Act (1). By the 62nd section it was provided that for the purpose of any rate to be made or levied under the Act "all lands used as a railway" constructed under the powers of any Act of Parliament should be assessed and liable in the proportion of one-fourth part only of the net annual value of such lands respectively. It will be observed that while one of the rateable hereditaments mentioned in the 12th section of the Valuation Act of 1852 is denominated a "railway," the expression used in this 62nd section of the Towns Improvement Act is "lands used as a railway"; but, in my judgment, the Legislature did not intend, by the difference in expression, to indicate any difference in character between a "railway" and "land used a railway," for valuation or rating purposes.

The Towns Improvement Act made no provision for appeal from general assessments, though it did for appeals from private or district assessments, and it was not until the Irish Local Government Act of 1871 (2), section 29, that an appeal to Quarter Sessions against a *town* rate was given. Under that section it is possible for any person aggrieved by a rate, or who has any material objection to any person being put in or left out of such rate or to the sum

(1) 17 & 18 Vict. c. 103. (2) 34 & 35 Vict. c. 109.

charged on any person therein, to appeal, and the Court is to hear and finally determine the matter of the appeal and to make an order which is to be final and conclusive upon all parties.

I think that the enumeration of the statutes which I have given is exhaustive of such as have a direct bearing on the questions discussed in this case. The first of such questions, as I have already indicated, is whether the determination by the Commissioner of Valuation of the *character* of the premises set forth in his valuation list, unobjected to or unappealed from, is so conclusive in its effect as to prevent the defendant questioning it in an action for the rate. Morris, J., in a dissenting judgment in the Exchequer Chamber in the case of *The Guardians of Londonderry Union* v. *The Londonderry Bridge Commissioners* (1) expressed himself in favour of that conclusion, and also considered that the defendants could not dispute their liability by an appeal against the rate. This question had, however, been withdrawn, and it was not considered necessary by the other members of the Court to offer an opinion on it; and while I fully appreciate the considerations in favour of the finality of the revised valuation lists, I would be slow to give a decision in the present case against the defendants based on that construction of the Valuation Acts. The far-reaching character of such a decision suggests great difficulties to my mind which I do not propose to discuss inasmuch as I have formed a strong opinion on the other point which involves a determination as to the effect of an unappealed-from rate. Is such a rate absolutely decisive of liability, or only to a qualified extent? The cases to which I shall presently refer establish that if there be no original jurisdiction to impose a rate, the latter is not binding from any point of view, inasmuch as it is made without jurisdiction and is a nullity. Whereas, if there was original jurisdiction to impose the rate, and the objection to its validity is based upon excess or exemption, such objection is properly the subject-matter of appeal and is not available as a defence in an action for the rate. One test of original jurisdiction occurs in the rating of a person who is not in occupation of the rated premises. There is no power to impose

(1) Ir. R. 2 C. L. 577.

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the rate on a person who is not the occupier, and in any proceeding to enforce or recover a rate from a person named in the valuation list and rate-book, but who happens not to be the occupier,—an absolute defence is afforded. On the other hand, if it appears that there was a primary jurisdiction to rate, but the person rated relies on exemption, his objection is, in my opinion, properly the subject of appeal, and cannot be raised in an action for recovery of the rate. In *Murphy* v. *Lyons* (1) (argued on demurrer), which was an action for replevin by a resident in Belfast whose goods had been seized,—the plaintiff's liability for rates depended on whether the district in which his premises were situate was, as a fact, actually "lighted and watched" as provided by a local Act,—and, it being admitted for the purpose of the demurrer that the district was not lighted and watched, it was held (Fitzgerald, J., dissenting) that there was no authority to make the rate and that the plaintiff was not bound to appeal against it, but might treat it and any order founded on it as nullities. Fitzgerald, J., was of opinion that the plaintiff's case was one of exemption only and consequently the proper subject-matter of appeal and not raisable in an action. He refers at some length in support of his conclusion to *The Churchwardens of Birmingham* v. *Shaw* (2), where Lord Denman, C.J., taking a case where the rate is good on its face as being imposed on an "occupier" says, "whether that *prima facie* case can be answered by circumstances affecting the character of the occupation is matter to be determined by the Court of Appeal on appeal made." O'Brien, J., in his judgment recognizes the distinction and suggests cases where the objections would only be available on appeal,—such as where the ground of objection to the rate was "something personal to the party rated, or arising from something peculiar in the extent or character of the rated premises or from the use made of them." In such cases the claim for exemption was held to be only ground of appeal. A further point arose in *Murphy* v. *Lyons* (1). A special Act, subsequent in date to the principal Act, enacted that the owner of a demesne of 40 acres should under certain circumstances be exempt from

(1) 17 Ir. C. L. R. 9. (2 10 Q. B 868.

rates; and it was held that this claim for exemption was one available only on appeal,—O'Brien, J., stating that the objection was grounded on the extent and nature of the rated premises and on the manner in which they were used.

The law on the subject is succinctly stated by Gibson, J., in *The Guardians of New Ross Union* v. *Byrne* (1). The question came before the Court, composed of six Judges, on a special case stated by the Lord Chief Baron on the hearing of a civil bill for the recovery of poor-rate assessed on the defendant in respect of premises portion of which were unoccupied. The defendant had not appealed from the rate. The judgment of Gibson, J., is practically the judgment of the Court. At page 164 he says:—

"(1.) The fundamental principle of rating law is that where premises are occupied by the person rated, no objection as to excess or exemption can be raised by the rated occupier against a rate, good on its face, save by appeal.

"(2.) Where a rate is made in respect of premises of which the person rated is not occupier, the rate is made without jurisdiction; and the person rated notwithstanding that he has appealed and appealed unsuccessfully, can set up the invalidity of the rate by way of defence to any proceeding to recover it. This proposition is established by a chain of authorities which would require a statute to overrule."

In that case the Court decided that non-occupation of part, by the person rated, went to the root of the jurisdiction to rate, and that the defendant was not liable.

It seems to me that, after the decisions in the two cases I have mentioned, the only question for consideration is whether the rate sued for in this action was made without jurisdiction. If there was authority to make the rate in the first instance, and the defendants' case is one of exemption, the rate is good on its face and could only be challenged by appeal. Such an appeal could be successful only by the defendants establishing that what is described in the valuation lists as "station," "stationmaster's house," "corn store," &c., should in the column headed "Description of

(1) 30 L. R. Ir. 160.

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tenement" have been entered as "railway," and that the *figures* of the valuation should have appeared in the column headed "Railways, fisheries, tolls, half-rents, &c." Whether the premises be regarded as "Railway" or "Land used as a railway," it is clear that they were rateable hereditaments within the 12th section of the Valuation Act, 1852. By entering them in the particular columns and under the particular headings in which they appear in the lists, the Commissioner has in effect determined that they are not to be regarded as "railway" or "land used as a railway" and consequently not exempt from the full rate, and if he has made a mistake in this description of the premises in consequence of which the rating authority has—as they were bound to do under the Adaptation of Enactments Order, 1899—assessed them at the full rate, such mistake might have been corrected either (1) by an objection lodged with the Commissioner; (2) by an appeal from the Commissioner; or, in my opinion (3), by an appeal from the rate. But the basis of an appeal from the rate, unless when the objection was grounded on non-occupation, would have involved the recognition of the original jurisdiction to rate. The contention would have been, that the subject-matter was a "Railway"—that it was a rateable hereditament within the Valuation Act of 1852 and, under that Act, *prima facie* rateable on the entire valuation, and that the Commissioner should, by a proper adjustment of his lists, have so described and placed it as to show that it was a "railway" and, as such, rateable only to the extent of one-fourth of the valuation. That contention implied that the premises should have been dealt with by the Commissioner in some way,—that they should have appeared in his lists under some heading, and—that the accuracy of his determination was governed by considerations of the character and user of the premises. I am, therefore, of opinion that the rating authority had clearly a rating power over these premises; that the defendants' case is one of exemption; that such case was available only by way of appeal; and that it cannot be relied on in an action for the rate.

I therefore think that the judgment entered for the defendants should be set aside and judgment entered for the plaintiff for the amount claimed in this action and costs.

PALLES, C.B.:—

This is an action for recovery of arrears of a rate assessed upon hereditaments, of which the defendants are occupiers, by an urban district council, under the Towns Improvement Act (Ireland), 1854, sect. 60. That section authorizes the Town Commissioners (now represented by the urban district council), to assess, for the purposes of the Act, "the occupiers of premises within the town . . . rated in respect of such premises under the Acts for the relief of the destitute poor."

The 62nd section of the Act enacts that for the purposes of any rate, "*all lands used as a railway* constructed under the powers of any Act of Parliament for public conveyance shall be assessed and liable in the proportion of one-fourth part only of the net annual value of such lands."

Some of the hereditaments in question here are described in the tables of valuation in force at the time of the assessment as "Railway," and such hereditaments have been assessed upon one-fourth part only of their net annual value. As to them, no question arises. The other hereditaments, however, are not described in those tables as "Railway," and upon them the assessment has been on their full net annual value. As to the rate on these hereditaments, the plaintiff insists that, by reason of the absence of the description of "Railway" in these tables, the urban council was not only entitled, but was bound, to assess them at their full net value; and it is admitted that, if he be correct in this contention, a balance—the amount of which is admitted—remains due on foot of the sum sued for, and that a verdict must be entered for the plaintiff for that amount.

Upon the other hand, it is admitted that a part of an hereditament, which has been assessed at its full net value, is, in fact, part of lands used as the Great Northern Railway, within the meaning of sect. 62 of the Act of 1854, and in respect of which, had it been described in the tables of valuation as part of the railway, the assessment should have been on one-fourth only of its net annual value. If, then, the plaintiff's contention be not sustainable, and if, notwithstanding the absence of the word "Railway" from the description in the tables of valuation, the

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defendants are entitled to the partial exemption on *this part* of the hereditaments which is provided by the Act, the assessment on the entire hereditament of which it is parcel would be bad; and it is admitted that, in that event, the sum paid into Court would be sufficient to cover the amount of all the assessments made at the legal rate; and, consequently, that the verdict for the defendants must stand.

Therefore the question for decision is, whether the absence in the tables of valuation of the description of the hereditament as a "railway" or "part of a railway" authorizes and requires the assessment to be at the full net value?

I am of opinion that that question must be answered in the affirmative.

The question is, as far as I am aware, a new one, and is undoubtedly one of great public importance; as upon that depends whether a rating authority must, in making a rate, determine, at the risk of its validity, the portions of railway property, which answer the description of "lands used for a railway," within the meaning of the Act of 1854.

The determination of this question depends upon the construction of the 62nd sect. of the Act of 1854; and on the code of Valuation Acts, especially the 15 & 16 Vict. c. 63. We have first, then, to see what is the meaning of the expression "lands used as a railway," as they occur in sect. 62 of the Act of 1854. There had been much legislation on the same lines prior to this Act. A similar provision is contained in sect. 88 of the English Public Health Act of 1848 (11 & 12 Vict. c. 63), which Wills, J., in *London and North-Western Railway Co.* v. *Llandudno Commissioners* (1), treats as the first Public Act in which such a provision is contained; but he says that since 1848 such legislation has been general.

The question here, therefore, arises upon precisely the same words as have been considered in a long line of cases decided in England, and as to which those cases are distinct authorities.

Prior to referring to a few of these cases, it is right to remark that in England, "railways" were not and even now are not

(1) [1897] 1 Q. B. 297.

rateable *quâ* railways. The statute of 43rd Elizabeth did not constitute any rateable hereditaments within the description of which they could come, except "lands." They were rateable only because their existence involved the use of land. Consequently an exemption from rates, whether whole or partial, in an English Act of Parliament, of "Railways," would have been inaccurate. The rate was assessed on lands constituting or being used as the railway; and we find that in all the cases which determined what lands answered the description of "lands used as a railway," the question discussed in the judgments was what lands were "the railway." Thus in *The South Wales Railway Co.* v. *Swansea Local Board of Health* (1), Lord Campbell, C.J., says, at page 195:—

"It seems to me that the line itself, the sidings, and the turntables on which the carriages actually go, and so much of the land at the side as is occupied for the necessary support of these, are, in every sense, *part of the railway*. . . The matters enumerated, with the exceptions I have stated, are *ancillary to the working* of the railway, but *are not part of it*"; and, because they were not part of it, he held that they were not "used as a railway" within the meaning of words identical with those we have here. He thus treats the "lands used as the railway" as being the lands which are the railway.

So, too, Wightman, J., says, at page 197:—

"I think that in applying them" [*i.e.*, the words of the Act] "we must consider the offices in the present case as *no part of the railway*, though necessary for the traffic on the railway, and used for the purposes of that traffic; and consequently that they are rateable at their full value."

And Erle, J., says, at page 199:—

"But stations and all those buildings for which, under their statutable powers the company may take land beyond that *necessary for the line of railway*, are not within the exemption."

In *Newport Dock Company* v. *Newport Board of Health* (2), Cockburn, L.C.J., in delivering judgment for himself and for

(1) 4 E. & B. 189. (2) 2 B. & S. 708.

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Crompton and Blackburn, JJ., treats the partial exemption under the words "*used only as* a railway constructed under the powers of any Act of Parliament for public conveyance," as equivalent to a railway constructed under such powers. After showing that it was so constructed, he proceeds: "and, therefore, is to be rated on the lower scale"; and he refers to the *Swansea Case* (1), as showing what was to be considered as "part of the railway" for that purpose.

In *North-Eastern Railway Company* v. *Scarborough Local Board* (2), heard before Lush, Hannen, and Hayes, JJ., those learned Judges held that "so much of the strip of land as is necessary to the use of the railway should be included as *part of the railway.*"

In *Williams* v. *London and North-Western Railway Company* (3), A. L. Smith, L.J., says: "What was meant" [by land used as a railway] "was a railway in the ordinary sense, that is, a line of rails, connecting one place with another, over which goods and passengers are carried."

In *Blackpool and Fleetwood Tramroad Company* v. *Thornton Urban Council* (4), the question was whether the plaintiffs' line of tramroad answered the description of "lands used only as a railway." within the meaning of sect. 211, sub-sect. 1 (*b*), of the English Public Health Act, 1875. In that case, Farwell, L.J., says: "It is conceded that physically the land in question, with the rails and other appliances on it, is undistinguishable by the eye from an ordinary railway"; and after referring to the Swansea and Newport cases, he proceeds:—

"In my opinion the proper way of considering the section is first to ascertain *whether in fact the property in question is or is not a railway*, as that phrase is ordinarily understood accordi ngto the ordinary rule of construing statutes . . . and then to ascertain whether it has been constructed under the powers of an Act for the purpose of being used as a way or road for public conveyance." Buckley, L.J., differed, but on a ground not material here, that the true character of the tramroad could be ascertained only from

(1) 4 E. & B. 189.
(2) 33 J. P. 244.
(3) [1900] 1 K. B., at p. 167.
(4) [1907] 1 K. B. 568.

the Act under which its construction was authorized, which the learned Lord Justice thought showed that it was not a railway governed by the system of legislation beginning with the Railways Clauses Act, 1845.

From these authorities, and many others which if necessary might be referred to, I hold that the expression "lands used for a railway," in sect. 62 of the Towns Improvement Act of 1854, really means "a railway."

With this knowledge, I come to the 15 & 16 Vict. c. 63, the object of which, as recited in its preamble, is to make one uniform valuation of lands and tenements in Ireland, which may be used for *all* public and local assessments and other ratings. Accordingly, it proceeds to constitute the office of Commissioner of Valuation, and to provide for the making of a valuation, by or under the direction of the Commissioner, of the entire of Ireland. By the 12th sect. rateable hereditaments are defined. They include not only lands and buildings, but also, *inter alia*, all rights of fishery, canals, navigation and rights of navigation, *railways* and tramroads, rights of way, and other rights and easements over lands. The effect of this section was to transfer from the rating authorities to the Commissioner of Valuation the power of ascertaining the rateable hereditaments within their district, and of valuing them.

I pause here for a moment, to observe that the description of the hereditaments by this section declared to be rateable is not identical with that of the hereditaments made rateable under any English Act of Parliament; or even with those which, by the 1 & 2 Vict. c. 56, sect. 63, are declared to be rateable to poor rate. Under none of those Acts is a "railway" a rateable hereditament *as such*. Until, therefore, this Act came into operation, railways, although rateable in Ireland, were so rateable, not as "railways," but, as up to the present time they are rateable in England, as "land." Since, however, the last-mentioned Act came into operation, they have been (as I pointed out in *Alma* v. *Corporation of Dublin* (1) rateable as a "railway," being a herditament distinct from "land."

(1) I. R. 10 C. L. 476.

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The cases decided in England prior to the above Act—cases which it must be taken were within the knowledge of the Legislature at the time of its enactment—had to a large extent settled the principles to be adopted in ascertaining the rateable value of lands constituting, or used for, a railway. Whilst their value was, as was that of ordinary lands or buildings, the rent a hypothetical tenant upon certain terms would give for them, that hypothetical rent was ascertained in the case of a railway in a wholly different manner from that adopted in reference to ordinary land or an ordinary building. In valuing a railway—extending, it might be, through several rating districts and several counties—the value of the entire line was arrived at, and then that entire value was distributed, according to certain complicated principles between the parts of the one railway which lay within each separate rating district. In result, then, the value of lands which were part of a railway, and were valued according to the principles applicable to railways, might bear no relation to the value of the same lands valued as ordinary lands.

The 12th section, therefore, imposed upon the Commissioner the duty of ascertaining that which was preliminary to any valuation, *viz.*, the nature of the hereditament; and a decision of the Commissioner (such as it is admitted has taken place here), that land which was part of a railway was "land," involves a decision that it was not part of a railway, and is erroneous, and seriously affects the rights and liabilities of the railway company and the rating authority.

With these observations, I proceed now to the other relevant sections of the 15 & 16 Vict. c. 63, merely premising that I refer to them as they have been adapted to the present system of Local Government under the provisions of the Local Government Act of 1898.

Section 17 directs that when the valuation or revision of the valuation of all hereditaments within any county, barony, or poor law union shall have been completed, a table of the hereditaments contained in each townland and of their respective valuations shall be signed by the Commissioner, and that printed copies of it, in the form set forth in the schedule to the Act, shall be sent to, *inter alia*, the clerk of the council of the urban district in which they

are situated; and the clerk is directed to publish notice of the places at which, for twenty-one days, these copies shall be open for public inspection.

For the form in this schedule, a new form has been substituted by the 23 Vict. c. 4, passed in 1860, being after the Towns Improvement Act of 1854; and in the schedule to this Act, the form is filled up as a model; and in the column headed "Description of Tenement," there is an entry of "Railway," adding its length in lineal perches, its area, and the total amount of its valuations without distributing the amount between land and buildings, a distribution which is essential in reference to an ordinary tenement.

By the 19th section of the Act of 1852, it is enacted that any person aggrieved by reason, *inter alia*, of any "*inaccurate description of any tenement or rateable hereditament*," may appeal to the Commissioner of Valuation, who by sect. 20 is directed to inquire into the subject-matter thereof; and, if necessary, to direct a valuator or surveyor as the case may require, who shall not have been previously employed in making the original valuation, to view the hereditament, and investigate the complaint, and report to the Commissioner; and the Commissioner is empowered to alter the valuation of the hereditament, if from such report it appears to be necessary to do so.

The omission to designate as "railway" in the tables of valuation that which is part of a railway is, in my opinion, plainly a "misdescription" within the meaning of this section, from which either the railway company or the rating authority might appeal.

By section 21 the Commissioner is directed to prepare a statement or list of cases in which the original valuation has been altered, or refused to be altered. This list is to be published by the clerk; and by the 22nd section an appeal to Quarter Sessions is given to "any person aggrieved by the valuation of any tenement or tenements contained in" the last-mentioned list; and section 23 enacts that "the determination of the said Court in or concerning said premises shall be conclusive and binding on all parties to all intents and purposes whatsoever." Thus, in the case of such a misdescription as we have here, there is a further appeal to Quarter Sessions, whose decision is final.

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By the 10th section of 23 Vict. c. 4, a further appeal to one of the Superior Courts of Law, now represented by the High Court of Justice, is given to the Commissioner or any other party to the appeal, on any question of law; and by the 60 Vict. c. 17 a further appeal is given from the High Court to the Court of Appeal. Thus, by this elaborate code of legislation, either the Commissioner of Valuation, or any aggrieved party, can carry any question of law, such, for instance, as misdescribing part of a railway as "land" to our highest tribunal short of the House of Lords.

The Legislature, having thus made what it deemed adequate provision for the true determination of these questions of law, enacted by section 25 of the 15 & 16 Vict. c. 63, that as soon as the valuation of any county should have been finally completed, and if appealed against, as soon as such appeals should have been determined, the Commissioner should cause final lists to be made in a prescribed form, of all the rateable hereditaments within the district, and cause copies of the same to be transmitted to the Town Council of any town affected by such valuation.

Then follows a very important section, the 27th, which enacts that every rate for the relief of the destitute poor in an urban district, made after thirty days from the time when the council of such urban district shall have received such final list, and every rate made by any town council within the urban district, shall be made *upon the hereditaments and tenements liable thereto according to the valuation of each hereditament or tenement comprised in such lists* so signed and transmitted as aforesaid by the Commissioner of Valuation until the same shall be revised in the manner in the Act mentioned.

I have already observed that the effect of the 12th sect. of the Act was to deprive the rating authority of the power of ascertaining the rateable hereditaments upon the due ascertainment of which the validity of their rates depended. The series of enactments to which I have since referred provide the necessary complement to this legislation by making the validity of a rate independent of the action of the Commissioner to whom the powers of the rating authorities are transferred. By making, as these sections do, the description and value of the hereditaments contained in the tables of valuation conclusive "on all parties"—

on the rating authorities and the occupiers of the hereditaments—the rating authority is relieved from the liability of its rate being attacked, by reason of error in the tables of valuation as well in the description of a rateable hereditament as in the value placed therein on such hereditament. Section 27 compels the rate to be made upon the hereditaments in those tables according to their valuation as comprised therein; and the other sections, by making those tables final and conclusive on all parties, prevent such allegations as are made here by the defendants being relied on to show the invalidity of a rate.

It is said, however, that sect. 27 directs the rate to be made "on the hereditaments and tenements liable thereto"; and that you must first ascertain, outside the Act, the hereditaments and tenements liable. This is true; but under section 60 of the Towns Improvement Act of 1854 the rateable persons are "the occupiers of premises within the town liable in respect of such premises under the Acts for the relief of the destitute poor," which involves that the hereditaments liable are those liable to the poor rate.

Under both 1 & 2 Vict. c. 56, sect. 63, and 15 & 16 Vict. c. 63, sect. 12, a railway, as I have already pointed out, is a rateable hereditament—under the former as "lands," and under the latter as a "railway." The defendants as occupiers of such railway are under sect. 52 (1) of the Local Government Act, 1898, liable to be assessed to the poor rate; and, as such occupiers, are also liable under sect. 60 of the Towns Improvement Act, 1854, to be assessed to the urban rate in question here. Therefore, under the very words of sect. 27 of 15 & 16 Vict. c. 63, the rate in question is to be assessed upon the defendants as occupiers of the hereditaments in their occupation according to the *valuation* of each hereditament comprised in the final lists of the Commissioner of Valuation transmitted by him to the clerk of the urban district council, which lists have been given in evidence.

The word "valuation," in sect. 27, means the entry in respect of the hereditament contained in the lists, which are to be in the statuable form, which originally was that contained in the schedule to the 15 & 16 Vict. c. 63, and is now that in the schedule to the 23 Vict. c. 4, or such other form as the Treasury

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may approve. But, whatever be the form, it is of the essence of the Acts I have referred to that it shall contain an accurate description of the physical thing existing *in rerum naturâ* which the Legislature has declared to be a rateable hereditament. I need not discuss, in a case such as the present, which is not within sect. 2 of the 17 & 18 Vict. c. 8, whether the Commissioner of Valuation is bound, or indeed has jurisdiction, to state "the use" to which the hereditament is actually applied. That question does not arise here; but if a particular portion of land is, in fact, part of a railway, his jurisdiction and duty extend to stating, just as he has done in respect of some of the hereditaments for which the defendants are rated, that it is, in fact, a "railway," or "part of a railway." I arrive at this conclusion on the plain ground that it is rateable *as* a railway.

At the time of the passing of the 15 & 16 Vict. c. 63, the long line of cases, which had been decided as to the matters which might be taken into consideration in rating the part of a railway within a parish or town, and the mode of ascertaining its value, must be presumed to have been within the knowledge of the Legislature. These matters included many which could not be taken into consideration in valuing an ordinary field, as to which a wholly different mode of arriving at the value should be adopted; and I am of opinion that, under that Act, it was imperative on the Commissioner to value lands used as a railway as part of a railway, and to describe them on the tables of valuation as "railway," and that an appeal would have lain, either by the occupiers of the hereditament, or by the rating authority, from any erroneous determination as to whether any particular structure, siding, or other thing *in rerum naturâ*, was or was not a "railway."

Thus I am of opinion that that part of the jurisdiction vested in England in Quarter Sessions, of determining on appeal from a rate, whether a particular thing is or is not part of a "railway," is in Ireland vested in the Commissioner of Valuation, and in Quarter Sessions on appeal from him, and that the jurisdiction of the High Court in England, in respect of that subject-matter, exercised on appeal by case stated from decisions of Quarter Sessions on hearing appeals from rates, is exercisable in Ireland

by the High Court and Court of Appeal, not on appeals from rates, but on appeals from Quarter Sessions decisions on appeals from the Commissioner of Valuation.

In *Moore* v. *Boyd* (1) I stated the view of the Divisional Court which heard that case, as to the construction of the Valuation Acts and as to the effect of the decision of the Court of Quarter Sessions upon an appeal from the Commissioner as to a hereditament being one of a public nature, under sect. 2 of 17 & 18 Vict. c. 8. We held there that that decision of Quarter Sessions was, for rating purposes, a judgment *in rem*.

In the present case we have to deal with the decision not of the Quarter Sessions, but of the Commissioner of Valuation; but we have the authority of the Court of Appeal in *The Queen* v. *The Commissioner of Valuation and the Great Southern and Western Railway Co.* (2) that the decision of the Commissioner of Valuation is a judicial one. In my opinion, his decision, unappealed from, has the same effect as its affirmance on appeal, had there been an appeal, would have had; and that his decision of the description of a rateable hereditament is of the same judicial nature as was that in the *Great Southern and Western Railway Case* (2), which was a decision as to amount only; and, in my opinion, the description contained in the list is, in relation to the rating of the hereditament, when unappealed from, as it is here, final and conclusive, and cannot be questioned in an action.

I further hold that the entry in the tables of valuation here, which does not state that the hereditament is "railway," and, presumably, does not ascertain the amount of its valuation as if it were a railway, amounts to a decision that it is not rateable as a railway. There is no decision that it is a railway; and, as it lies on the defendants to bring the hereditament within the partial exemption of the Act; as it cannot be within that exemption unless it is a railway; as, for rating purposes, the authority to determine whether or not it is a railway is the Commissioner of Valuation; and, finally, as he has not determined that it is a railway, I hold that, in law, it is liable to be assessed at its full value.

(1) [1911] 2 I. R. 579. (2) [1901] 2 I. R. 225.

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The learned argument of Mr. Ronan, for the defendants, may be roughly stated thus:—"The Valuation Acts are not Taxing Acts; there is no jurisdiction to rate in the present case save under sect. 60 of the Towns Improvement Act, 1854; that Act authorizes a rate upon one-fourth only of the net value; here the rate was on the full net value; therefore it was made without jurisdiction."

I fully agree that our Valuation Acts are not Taxing Acts, and that under sect. 27 the rate is to be made "upon the hereditaments and tenements liable thereto"—a description which must be ascertained from the enactment imposing the rate. But I do not agree that the practical effect of a Valuation Act may not be to vary the amount of the assessment in a particular case. The exercise of jurisdiction, by any judicial tribunal, must necessarily be liable to error. Consequently the erection of a new judicial tribunal, to determine *finally* a matter material to the amount of an assessment, must involve the possibility of an erroneous determination, and of the underlying error being carried into the assessment, even to an extent which would have rendered the assessment unauthorized by its original statute, had the error been that of the tribunal to assess. It would be different were the tribunal administrative only, and not judicial. So, too, would it be different were its decision not final and binding on the parties liable to be assessed. But, in every such case, the question must be whether the decision of the judicial tribunal is intended to be final and binding on the parties liable to be rated.

In my clear opinion the urban district council had no jurisdiction to assess to the rate here, save upon the hereditaments described in the list, as so described and according to their valuation as stated therein; and I hold, for the reasons I have stated, that, in the absence of appeal, the erroneous description of the hereditament bound both parties—the Council and the Railway Company.

I desire to say a word in reference to the subject-matter of sect. 62 of the Act of 1854, to which, for the sake of clearness, I have not heretofore adverted. It includes, in the exemption which it prescribes, not only "lands used as a railway," but also "all lands used as arable, meadow, or pasture ground only, or as wood-

lands, or market gardens, or nursery grounds." We were asked at the bar, in a rather triumphant tone, as if the answer to the question would necessarily determine the case, whether a description, in the tables of valuation, of ground being arable, meadow, or otherwise within any of the classes specified in this section, other than lands used as a railway, was essential to their partial exemption from rating? I answer, certainly not. The Commissioner has not jurisdiction to determine any of these matters. None of them is essential to the description of any rateable hereditament. Any such case is different from that in hand here, as the description of the rateable hereditament here involves the determination of "railway" or "not railway," and the jurisdiction to determine it arises not under the Act of 1854, but under the Valuation Acts, under which there is not jurisdiction in the Commissioner to determine whether land is arable, meadow, or pasture.

The only other objection to the validity of the rate is its alleged non-compliance with sect. 61 of the Towns Improvement (Ireland) Act, 1854, and sects. 170 and 172 of the Towns Improvement Clauses Act, 1847, which relate to the manner of making rates, and which are, by sect. 55 of the Act of 1854, expressed to be incorporated with it.

The 61st section of the Act of 1854 directs that the Commissioners (now represented by the district council) shall annually cause to be made up a book of assessment, to be signed by the Chairman and two others of the Commissioners, showing the net annual value of the whole premises in the town under the poor law valuation liable to be assessed under the Act, and according to which the assessments are intended to be levied. This book of assessment is to be open to the inspection of all ratepayers. The Commissioners are given power to rectify certain mistakes and errors, and then the section proceeds—"And in each year a copy of the said book of assessment, as finally adjusted by the Commissioners, signed by the Chairman and two Commissioners, and countersigned by the clerk, shall be delivered over to the collector, *as the rule for levying* and collecting the annual assessment under this Act, and shall be deemed to be evidence of each and every separate assessment for the purposes of this Act."

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Section 170 of the Act of 1847 directs the Commissioners, before proceeding to make a rate, to cause an estimate to be prepared of the money required, showing the several sums required, the rateable value of the property assessable, and the poundage rate necessary to raise the amount; and directs that such estimate, when approved of by the Commissioners, shall be entered in a rate-book to be kept by the Commissioners as thereinafter mentioned. The 172nd section is the enactment which provides for the making of the rate-book thus referred to. It enacts that every such rate shall be fairly transcribed in a book to be kept for that purpose, which may be in the form in the Schedule A to the Act, or as near thereto as the circumstances of the case will admit of; and that it shall contain an account of every particular set forth at the head of the respective columns, so far as the same can be ascertained, and that it shall be signed by not less than six of the Commissioners.

The particulars in the form in the schedule are not material to be mentioned here. Our Court of Appeal has decided, in *R.* (*Mary McKenna*) v. *Urban District Council of Monaghan* (1), that, notwithstanding the provision in sect. 61 of the Act of 1854 as to the signature of the assessment book, the provision in the 172nd section of the Act of 1847, that the rate shall be signed by not less than six Commissioners, applies to such a rate as that in question here; and the argument for the defendants here is that this decision renders necessary a duplication of the rate-books; one, the assessment-book mentioned in section 61 of the Act of 1854, which, in my view, is a rate-book, and nothing more; the other, the rate-book directed by the 172nd section of the Act of 1847.

So far from gathering any such conclusion from the judgment referred to, it is apparent that the exact opposite was the view of the Court. The possibility of validly including in one rate-book all the particulars required by both Acts is pointed out in more than one of the judgments of the members of the Court of Appeal. These judgments have been followed by the Local Government Board, in prescribing the form of such rate as the present—a

(1) 38 I. L. T. R. 18.

form which has been accurately followed by the urban district council here. The estimate directed by sect. 170 of the earlier Act has been approved by the council, and entered in the rate-book. It is not suggested that it is not substantially in the form in Schedule A to the Act of 1847, or that it does not contain an account of every particular set forth at the head of the respective columns in that form. It also shows the net annual value of the whole premises in the town, according to the valuation under the Act of 1852, which has now been substituted for the poor law valuation; and which, if my judgment on the first objection be correct, is the net annual value of the premises according to which the hereditaments are to be assessed, and the rate levied. It is signed by the chairman and two commissioners; and the copy is signed by them, and countersigned by the clerk, as required by sect. 61 of the Act of 1854; and it is also signed by six of the members of the council, in accordance with sect. 172 of the Act of 1847.

This objection also, therefore, in my opinion, fails.

These were the only objections to the validity of the rate, which I consequently hold to be valid.

The other objections argued as to the effect of the rate not having been appealed from, do not arise. They were contingent upon our being of opinion that there was some invalidity or error in the rate; and I offer no opinion in reference to them.

In result, then, I hold that the verdict for the defendants should be changed into one for the plaintiff for the agreed sum and that judgment should be entered thereon with costs, including the costs of this motion.

J. G. T.

The defendants appealed to the Court of Appeal (1).

Serjeant Matheson, *K.C.*, and *Gordon*, *K.C.* (with them *Ronan*, *K.C.*, and *Hunt*), for the appellants:—

It is clear that portion of the premises of the defendants, in respect of which the rates sued for were assessed, was "used as a railway constructed under the powers of an Act of Parliament

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for public conveyance" within sect. 62 of the Towns Improvement (Ireland) Act, 1854, and was accordingly liable in the proportion of one-fourth part only of its net annual value, and not of its whole: *South Wales Railway Co.* v. *Swansea Local Board of Health* (1); *London and North-Western Railway Co.* v. *Llandudno Improvement Commissioners* (2). That being so, it would be open to us to contend that the entire rate was bad; but the defendants have paid into Court sufficient to meet the plaintiff's claim allowing for the proper exemptions in respect of the lands which ought to have been inserted in the valuation lists under the heading "railway," and we contend that the defendants are not estopped from raising a defence to this action, based on their right to exemption as regards such lands, by reason of not having appealed against either the valuation or the rate. Admittedly there was no right of appeal to Quarter Sessions against the rate until the Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109, s. 29), and we submit the new remedy thereby given was cumulative, and did not preclude the right of disputing liability for a rate in an action, as in *Manly* v. *Young* (3). So also in *Dublin Corporation* v. *Trinity College* (4) there was no appeal from the rate there in question. In *Moore* v. *Boyd* (5) it was held that a decision of a Court of Quarter Sessions on appeal from the Commissioner of Valuation, on the question of lands being of a public nature within sect. 2 of the Valuation Act, 1854 (17 & 18 Vict. c. 8), was a judgment *in rem*; but that decision cannot be extended to this case. By sect. 2 of the Valuation Act, 1854, it is the duty of the Commissioner in making out the valuation lists "to distinguish all hereditaments and tenements, or portions of the same, of a public nature, or used for charitable purposes" &c.; and his doing so is a necessary condition precedent to exemption from rating: *Harte* v. *Holmes* (6). There is no similar provision with regard to lands "used as a railway," and the valuation list cannot be regarded as a judgment *in rem* as to whether lands are or are not "used as a railway."

(1) 4 E. & B. 189.
(2) [1897] 1 Q. B. 287.
(3) [1895] 2 I. R. 676; [1896] 2 I. R. 126.
(4) 2 New I. J. R. 291.
(5) [1911] 2 I. R. 579.
(6) [1898] 2 I. R. 656.

To hold otherwise would constitute the Commissioner of Valuation a taxing authority, which he is not. The Valuation Acts are not Taxing Acts: see judgment of FitzGibbon, L.J., in *Dublin Corporation* v. *Trinity College* (1). In *Guardians New Ross Union* v. *Byrne* (2), Gibson, J., following the opinions of Fitzgerald, B., and Monahan, C.J., in the *Londonderry Bridge Case* (3), held that the Valuation Acts were not intended to alter the rateability of premises. In *Cemeteries Committee* v. *Commissioner of Valuation* (4) Holmes, J., held that it was not the duty of the Commissioner of Valuation to determine whether hereditaments which, under the 12th sect. of the Valuation Act, 1852, are to be deemed to be rateable, are exempt from rating upon special grounds. The question of whether the lands in dispute were to be assessed at one-fourth of their net annual value, or at their full value, was one, therefore, for the rating authorities; the Commissioner of Valuation had only to assess the figures of the valuation.

If it be asked how the rating authorities could have segregated the figures that were sent to them, we answer that they could have got further particulars from the Commissioner of Valuation under sect. 9 of the Annual Revision of Rateable Property (Ir.) Amendment Act, 1860.

As to the decision of Kenny, J., that we are precluded from our defence by not having appealed against the rate as distinct from the valuation, we rely on *Murphy* v. *Lyons* (5), where it was held that the plaintiff was not estopped from suing in replevin by not having appealed against the rate for which a distress was levied. Our position is not that we are now claiming exemption from portion of a rate, but that there was no jurisdiction whatever to assess a rate upon these lands beyond one-fourth of their value; the duty was under sect. 27 of the Act of 1852 to make a rate upon the hereditaments and tenements *liable thereto*; and if the plaintiff has a right of action here to enforce payment of a rate, portion of which was illegally assessed, the defendants must inferentially have an analogous right of defence to that claim, from which they should not be precluded.

(1) 2 New I. J. R. 291.
(2) 30 L. R. Ir. 160, at 171.
(3) Ir. R. 2 C. L., pp. 597, 599.
(4) [1897] 2 I. R. 157, at 167.
(5) 17 I. C. L. R. 9.

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Jellett, K.C. (with him *Henry, K.C.*, and *Murnaghan*), for the respondent:—

We contend that the ascertainment of rateable hereditaments, including railways, is for the Commissioner alone; that the rating authorities are bound to rate on the rateable hereditaments as so ascertained; that they have done so in the present case, and, as they acted within their jurisdiction, the rate is good; and, consequently, the only method of testing the validity of what either the Commissioner of Valuation or the rating authorities did was by appeal. Sect. 11 of the Valuation Act, 1852 (15 & 16 Vict. c. 63), provides that every rateable hereditament is to be separately valued by the Commissioner of Valuation, and these, by sect. 12, include railways. The form of the valuation lists provided by sect. 30 of the Act of 1852 has been modified and altered. Every form, including that contained in the schedule to the Annual Revision of Rateable Property (Ir.) Amendment Act, 1860, and the one now in use, required rateable hereditaments to be distinguished under the heading "description of property," and it is the duty of the Commissioner of Valuation to so distinguish them, not that of the rating authority. Under sect. 25 of the Valuation Act, 1852, the "final list" is to be sent to the rating authority, by the Commissioner of Valuation, and under sect. 27, rates are to be levied according to such final list. An elaborate system of appeal against the valuation to Quarter Sessions was, in addition to the right of complaint to the Commissioner under section 19, provided by sect. 22 of the Valuation Act of 1852, and by sect. 23 the decision of Quarter Sessions was made final and binding. The nature of the valuation by the Commissioner was explained by Holmes, L.J., in *The Queen* v. *Commissioner of Valuation and Great Southern and Western Railway Co.* (1), where he said, "His valuation is undoubtedly a judicial act, involving the consideration and decision of questions of law and fact, with the result of imposing liability on, and affecting the rights of, members of the public"; while, at p. 231, the same learned Judge said—"I believe that we are all of opinion that unless and until a revised valuation is got rid of, either by means of an appeal or by writ of *certiorari*, the rate must be struck according to valuation." It cannot be said when in the present case the Urban District Council

(1) [1901] 2 I. R. 215, 224, at 229.

followed their specific statutory duty under section 26 of the Act of 1852, and clause 37 (*n*) of the Local Government (Adaptation of Irish Enactments) Order, 1899, in assessing rates on the basis of the final valuation lists furnished to them by the Commissioner of Valuation, which lists were unappealed from, that the matter still remained open, and that it was the duty of the Council, before assessing the rate, to take further steps to ascertain whether or not part of the defendants' property, not included as "railway," should have been so included. If the Council took a different view as to the description of the hereditament in question, no one could decide between them; there would be no means of segregating the figures furnished by the Commissioner, and chaos would be the result. As to the defendants being estopped from raising this defence by reason of their not having appealed, it is clear that section 23 of the Valuation (Ireland) Act, 1852, in enacting that the decision of Quarter Sessions on appeal shall be "conclusive and binding on all parties to all intents and purposes whatsoever," involves that the valuation, if unappealed from, shall be equally conclusive and binding. The same argument applies to the conclusive nature of the rate itself when not appealed from under section 29 of the Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109). As to this we rely on *Churchwardens of Birmingham* v. *Shaw* (1) and *Crease* v. *Sawle* (2), where Abinger, C.B., said :—"For a mere excess in the amount the remedy is by appeal." In *Overseers of Poor of Manchester* v. *Headlam* (3) it was held that Justices were bound to issue a distress warrant to enforce a poor rate against a railway company, payable in respect of property which was not, in fact, in the occupation of the company, but against which there had been no appeal taken.

Serjeant Matheson, K.C., replied.

[The following cases were also referred to :—*M'Cusker* v. *Commissioner of Valuation* (4); *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (5); *London and India Docks Co.* v. *Borough of Woolwich* (6); *North-Eastern Railway Co.* v. *Local Board of Scarborough* (7).]

(1) 10 Q. B. (N. S.) 868.
(2) 2 Q. B. 862.
(3) 21 Q. B. D. 96.
(4) 2 New I. J. R. 266.
(5) [1899] 2 I. R. 214.
(6) [1902] 1 K. B. 750.
(7) 33 J. P. 244.

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THE LORD CHANCELLOR :—

The Valuation Act of 1852 had become necessary to be provided for the whole country, in order to obtain a general valuation for rating purposes. The Commissioner of Valuation was appointed to be the officer, to carry out the necessary work, and the basis of making the returns to the respective local rating authorities was uniform through the various areas. A form of return was contained in the schedule to the Act, but the present form used was issued in 1899, by the Treasury, under the powers of section 6 of 23 & 24 Vict. c. 4. The whole law, with the necessary regulations made under statutory powers, has been fully expounded by the Lord Chief Baron. I agree in all respects with the learned Judge's judgment; and it would be superfluous to reproduce in any detail the valuation and rating system. The whole history of these has been recorded by the Lord Chief Baron. The valuation returns must be made out with the greatest care under and by the Commissioner of Valuation. The most specific and definite instructions are by statutes and orders given to him for the purpose. He has no rating power whatever. And having returned the lists, provisionally in the first instance, and sufficient public opportunity having been given for their inspection, several well-known steps of appeal as we know exist up to the Court of Appeal, and are available against all irregularities and inaccuracies. Eventually, the form now used as directed by the Treasury having been followed, the return is ultimately sent to the rating authority, when it is a document final and conclusive, both to the rating body and the individuals, and the companies, owners of the rateable property. Two well-known instances of exemption are properties held exclusively for charitable purposes, and of a public nature, and in their case it is distinctly enacted that they are exempted from all rates. For that purpose the Commissioner is directed by statute to describe on his lists these special cases, and to mark them as "distinguished," for the express statutory reasons of the statutes. The rating authorities, seeing the distinction drawn, exclude these particular properties from the category of those to be rated. Other properties, including that of railways—I am not now discussing the controversy raised

about parts of it—are with certain others placed, or should be placed, in the Treasury Form of 1899, and in the particular column headed "Railways, Fisheries, Tolls, Half-rents, &c." These are rateable, not to the full valuation, but only to limited parts, and, in the railway cases, to one-fourth of the value. The other properties valued must be included in two other columns, entitled "Lands and Buildings." Without further detail, the valuation list is then complete, and when returned to the rating authorities has a final and conclusive effect given to it. Just as the Commissioner has no function to rate, the rating bodies have no power to make a valuation. They must impose the rates according to the returns, giving the special privileges belonging to the property in the special columns. If the privileged railway rateable property is not included in the column I have already mentioned, but in one of the other two—lands and buildings—it will incur the full liability, and on the rating must be rated by the council up to the full valuation. In the present case that was what happened, and the defendant company was sued by the rate officer for the full amount. The trial took place, and the learned Judge entered a verdict and judgment in favour of the defendants. No appeal had been taken by the company at the proper stage against the valuation returns, and as the rating body was bound to take the course it did, no defence was open to the defendants, on any complaint of the action of the Commissioner. It was contended on the part of the defendants that if the plaintiff has a right to bring this action, they must have a right to make this defence. And the vital point raised is that in the action the plaintiff has a perfect right, in my opinion, as I have already stated, to rely on the effect given to the final valuation list, that it is final and conclusive. It has been already decided that that is so, and it will be shown in the decisions mentioned in the Lord Chief Baron's judgment. The valuation list had become an estoppel to the defendants. Accordingly the judgment at the trial for the defendants, in my opinion, ought to be set aside, and the order of the King's Bench Division should be affirmed with costs.

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HOLMES, L.J. :—

This action was brought by the rate-collector of the Omagh Urban District Council to recover the sum of £62 0*s.* 9*d.*, the balance due by the defendants for rates assessed by the Council for the year ending the 31st March, 1911. The total amount of such rates was £287 15*s.* 10*d.*, but the defendants paid, and the plaintiff received on account thereof, £225 15*s.* 1*d.*, leaving due the balance sued for.

The principal statute under which the Council claims to be entitled to the aforesaid rates is the Towns Improvement (Ireland) Act, 1854, which authorizes commissioners appointed pursuant thereto for any town to make once in each year assessments not exceeding the rates therein mentioned on the occupiers of premises within such town. The basis of such an assessment is necessarily the annual value of the premises assessed; and the provisions relating to it would be incomplete unless they show how such annual value is to be ascertained. Accordingly, sects. 60 and 61 provide that this is to be found in the poor law valuation, which must be read in connexion with sect. 62, prescribing that certain classes of lands therein enumerated, including all lands used as a railway constructed under the powers of an Act of Parliament for public conveyance, should be assessed and liable in the proportion of one-fourth part only of their net annual value.

For forty-four years after the passing of the statute of 1854 the steps necessary to bring a town within its provisions were not taken in Omagh; and, therefore, during that period the question in this appeal did not arise between the parties to this action, but by sect. 41 of the Local Government (Ireland) Act, 1898, the Towns Improvement (Ireland) Act, 1854, and the enactments amending the same were (subject to certain exceptions and amendments) made applicable to Omagh and other towns in a similar position. Since then the Urban Council has in every year assessed the town rate, pursuant to a document supplied by the Commissioner of Valuation similar in form to that used in 1910, and the rates so assessed were paid without objection.

In that year, however, there was raised for the first time the question to be decided in this appeal, which, in my opinion,

depends upon the character, the effect and the potency given to this document by the Irish Valuation Acts.

These statutes, with the decisions thereon, were fully discussed in the Divisional Court by Palles, C.B.; and, agreeing, as I do, in his reasoning and conclusions, I propose to confine myself to two or three of their leading features.

When statutory authority is given to any body to rate lands and tenements according to their annual value, some machinery must be provided for ascertaining such value. Previous to 1852, this had been done in various ways under different statutes, but in that year the Legislature thought it expedient to make one uniform valuation of lands and tenements in Ireland which might be used for all public and local assessments and other rating; and with this object, power was given to the Lord Lieutenant to appoint a Commissioner of Valuation. The person so appointed was a civil servant who, with the assistance of a competent staff, was to complete the valuation of the entire country, which had been begun under a previous statute, and to revise every year so much thereof as consists of premises variable in their nature. When the valuation or revision of valuation in any county, barony, poor law union, county of a city, or county of a town was completed, the Commissioner of Valuation was to make out a list or table of the several hereditaments and tenements contained in each townland or other denomination therein, and of their respective valuations, signed by him, and to transmit a sufficient number of printed or written copies of such lists, so signed, in a form set forth in the schedule of the Act, to certain local public officers; and elaborate provision is made to enable these valuation lists to be inspected by persons interested therein, who are given an appeal to the Commissioner in the first instance, and, if dissatisfied with the result thereof, to the Court of Quarter Sessions.

This Act was amended by 17 Vict. c. 8, but the only portions thereof that relate to the question at issue are further provisions to secure the annual revision of the valuation of tenements liable to frequent alterations, of which certain classes, including railways, are specially mentioned.

A further amending Act was passed in 1860—23 Vict. c. 4—which empowered the Treasury to advance out of the Consolidated

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Fund money towards the annual revision of the valuation. This Act specifies a new form for the lists of valuation, and enables the Treasury to approve from time to time of altered forms. It also provides for obtaining the decision of a Superior Court by means of a case stated on any question of law relating to the valuation or revision of rateable property in Ireland, and by a later Act a further appeal is given to this Court. Such are the enactments of the Valuation Acts to which I think it necessary to refer at present; and while I agree that they are not taxing statutes, they deal with a subject so closely connected therewith, namely, the valuation which is to form the basis of the assessment, that it is impossible to keep the statutory provisions on the two subjects separate, and that in the construction of either much help may be gained from the other. It has not and cannot be denied that, as far as valuation is concerned, the amount finally settled is conclusive, and that if there is no appeal in the prescribed manner from the sum appearing in the lists prepared and signed by the Commissioner, such sum cannot be disputed in an action or any other proceeding. But the valuation can only relate to certain premises described in the lists; and to the ordinary intellect, if the valuation is final, the description of the premises is equally final. Lands agricultural or pastoral are valued in one way, buildings in another, railways or lands used as a railway (I see no difference between these descriptions) in a third, and a salmon fishery in a fourth. I would, therefore, be prepared to hold on this ground alone that the description of the premises and the valuation appearing in the signed lists, if not appealed from, were equally final and conclusive.

I now turn to the form given in the schedule to the statute of 1852. I find therein (1) a reference to a map; (2) names of townlands and occupiers and immediate lessors; (3), description of tenement and area; (4), rateable annual valuation of (*a*) land; (*b*) buildings; and (5) total annual valuation of rateable property. This form is badly drawn, but, reading it in conjunction with the Act itself, I am of opinion that the intention was that under No. 3—"the description of tenement"—the particular class of premises was to be inserted as, for example, a railway, if it was a railway, and that in No. 5 the valuation thereof was to appear.

If this be so, it would be impossible to hold that the description and the valuation were not of equal potency. The description of the tenement is different in its nature from the names of occupiers or lessors. Who is tenant ought not to affect the valuation, but the kind of tenement is essential to it. Probably, in consequence of this form having been found unsatisfactory, another was substitutedfor it in the Act of 1860, making the point I rely on quite clear.

In this form examples of the description are given in the column headed "Description of tenement," and I find, amongst these examples, copper mine, railway, salmon fishery, turbary, without any valuation of land or buildings opposite thereto, but with the valuation thereof under the head of "Total."

A third form was approved of by the Treasury in, I think, the year 1899, and has been since used. It differs from the previous one by giving, under the title of "rateable valuation," a column for "railways, fisheries, tolls, half rents, &c.," but it shows equally clearly the valuation of certain premises described as railway. The only inference that I can draw from these forms is that on their true construction taken in connexion with the Valuation Acts the local authorities when they receive them in their final shape can only treat as "railway" what is so described therein, and would not be at liberty to so treat any tenement otherwise described.

This inference from the legislation is greatly strengthened by a comparison of it with the inference drawn by the defendants' counsel. As I understand their argument, they contend that notwithstanding the elaborate provisions in the Valuation Acts to make known to everyone interested, not only the valuation but also the description of the tenement valued, notwithstanding the appeals given first to the Commissioner and then to the Chairman of Quarter Sessions, with the right to have a case stated for the High Court on any question of law, with an appeal therefrom to this Court, notwithstanding the forms directed to be used by the Commissioner for the purpose of showing to what tenement his valuation is applicable, notwithstanding all this legislation, the responsibility of considering and deciding whether a particular tenement is in whole or in part a railway, or lands used as a railway, is imposed on the taxing authority.

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The result of this proposition is somewhat startling, and I propose to illustrate it by the valuation lists of 1910, with which this case is conversant. The Commissioner of Valuation then prepared his valuation list as he had done in previous years containing tenements described as railway, with the valuation thereof, and other tenements described as Omagh station (part of), stationmaster's house, corn-store, refreshment-room, and other descriptions, with the valuation thereof.

According to the construction I give the Valuation Acts, the rating authority is not merely entitled but bound, when what is called in sect. 25 and the following section of the Act of 1852 the final list is served, to assess as land used as a railway only what is described as railway and to assess the other tenements I have mentioned as buildings. The contention of the defendants is that it is the duty of the taxing authority to decide for itself this important matter.

Let me point out the consequence if such authority should differ from what appears in the final list. I take the description "Omagh Station, part of," the valuation of which is given as £382. The tenement so described, we are told, consists of sixteen component parts of which five ought to be described as railway and the rest not. I assume that the Urban Council would come to this conclusion, and I shall also assume that in doing so it would decide rightly a very difficult question, but the unfortunate result, if the defendants' contention is correct, would be that there could be no assessment on any part of the tenement.

The Urban Council is given no power to value a tenement or any part of it. The assessment can only be made on the valuation, and how is it possible to ascertain such valuation? I asked counsel for the defendants this question, and the only answer I received was that the Commissioner was bound to give every person interested full particulars of his valuation, showing the amount placed on each component part of the tenement. This is quite true, and if after the lists for 1910 were first published, such particulars had been asked for and an appeal had been taken, the lists might have been amended as the defendants desired. But this was not done, and the final lists were duly delivered. Sects. 25 to 32 of the Act of 1852, as made applicable to the

Urban Council of Omagh by subsequent legislation, show as clearly as language can do that once the final list is delivered the rate must be struck upon the valuation contained therein.

For these reasons I am satisfied that the plaintiffs are entitled to recover the sum sued for. Deciding the case on the grounds I have stated, it is unnecessary for me to consider the important matter which formed the basis of the judgment of Kenny, J. I wish it, however, to be distinctly understood that I express no doubt as to its soundness. I take up the same position in regard to it which he did in dealing with that of Palles, C.B.

Having decided for the plaintiff on the ground stated by him, he thought it unnecessary to discuss any other aspect of the case. This is also my attitude.

CHERRY, L.J.:—

Counsel for the defendants in this appeal pressed upon us very strongly that there was an inconsistency between the judgments of the two Judges who formed the majority in the Court below, and that if the judgment of the Lord Chief Baron was right, that of Mr. Justice Kenny must have been wrong, and *vice versa*. Though these two Judges reached the same conclusion by different roads, I can see no inconsistency whatsoever in the reasons given for their decisions. As I understand the judgment of the Lord Chief Baron, what he decided was, that the description given of tenements and hereditaments in the revised lists prepared by the Commissioner of Valuation, and furnished by him in the prescribed form to Urban District Councils and other rating authorities, is conclusive and binding upon all parties, whether rating authorities or ratepayers, and that no defence relying upon the inaccuracy of such description can be raised in an action to recover a rate struck in accordance with such revised list, where the defendant had an opportunity of appealing from the decision of the Commissioner of Valuation, and did not avail himself of the privilege.

Mr. Justice Kenny, while not expressing any dissent from the view of the Chief Baron, preferred to base his decision upon the finality of the rate struck by the proper rating authority,

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if unappealed from; his decision being that where there is jurisdiction to strike a rate, and where a rate is made by the rating authority in accordance with the revised lists furnished by the Commissioner of Valuation, the question of the amount of the rate can only be raised by way of appeal under sect. 29 of the Local Government Act, 1871, and not by way of defence to an action to recover the rate. He bases his judgment to this effect upon the fundamental principle of rating law as laid down by Mr. Justice Gibson in *Guardians of New Ross Union* v. *Byrne* (1), that "where premises are occupied by the person rated, no objection as to excess or exemption can be raised by the rated occupier against a rate good on its face, save by appeal."

Now, what inconsistency is there between these two judgments? It may well be that if an appeal were taken from the rate, relying upon some alleged erroneous description of the premises, the appeal might fail upon the ground that such question should have been raised by way of appeal from the Commissioner of Valuation, and that his description, whether right or wrong, must be then considered binding. But there may be other matters not coming within the province of the Commissioner of Valuation at all, which would be good ground of appeal from the rate, but which, if no appeal were taken, could not be raised by way of defence to an action for the rate. For instance, sect. 62 of the Towns Improvement Act, 1854, confers a partial exemption from rates in respect of "all lands used as arable, meadow, or pasture ground only, or as woodlands, or market gardens, or nursery grounds." There is no separate column for such lands in the form prescribed for the Commissioner of Valuation to fill up, and apparently no obligation upon him to investigate or determine the particular mode in which lands are used (save in the case of lands, or buildings, used for charitable or public purposes). The question, therefore, of the exemption of such lands would be properly tried on an appeal from the rate under the Local Government Act, 1871, and not by an appeal from the description of the premises by the Commissioner of Valuation. It would be no argument against the finality of

(1) 30 L. R. I., at p. 164.

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such an appeal to show that an appeal from the Commissioner of Valuation was also final. On the contrary, it would, in my view, be a powerful argument the other way.

Indeed, in this case it was strenuously argued by the counsel for the defendants that the exemption of railways was placed by the Towns Improvement Act, 1854, on the same basis as that of arable and meadow land, and that the Chief Baron was wrong in holding that railways under the Irish Valuation Acts were a separate hereditament, which it was the duty of the Commissioner to distinguish in his valuation. This argument was based upon the wording of sect. 62 of the Towns Improvement Act, 1854, which exempts not "railways," but "all lands used as a railway constructed under the powers of any Act of Parliament for public conveyance." There is a great deal of force in this argument, but it cannot, in my opinion, help the defendants; for I agree with the view of Mr. Justice Kenny as to the binding force of the rate if unappealed from, as well as with that of the Lord Chief Baron that the description in the valuation list is also conclusive in similar circumstances, and the only result of our adopting the appellants' view of the construction of the section would be that we should be bound to hold that the appeal in the present case should have been taken from the rate and not from the valuation. As, however, no appeal was taken from either in the present case, I do not see why it should be necessary for us to determine which appeal should have been prosecuted.

Upon the main question argued upon this appeal, namely, the finality of the decision of the Commissioner of Valuation, as to whether premises are to be rated as railways or merely as buildings, we start with the admitted fact that his decision as to the amount of the valuation, if not appealed from, is final and conclusive upon all parties. This was expressly admitted by Serjeant Matheson, and, indeed, could not be contested in face of the decision of this Court in *The Queen* v. *Commissioner of Valuation and Great Southern and Western Ry. Co.* (1). There it was held that a revised valuation was properly the subject of a writ of *certiorari*;

(1) [1901] 2 I. R., p. 215.

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though, for reasons not necessary for us now to consider, the writ was refused in the case then before the Court. The decision that *certiorari* lay was based upon the ground that the action of the Commissioner of Valuation in fixing the amount of a valuation was a judicial act. Lord Justice Holmes lays this down in express terms :—" Upon reading the sections prescribing the duties of the Commissioner," he says, " I find it impossible to hold that in making or revising a valuation he is discharging a purely administrative or ministerial function. His valuation is undoubtedly a judicial act, involving the consideration and decision of questions of law and fact, with the result of imposing liability on, or affecting the rights of, members of the public ; and although he does not hold a Court, nor adopt the usual course of legal procedure, he is constituted by the statute a tribunal with powers essentially judicial."

But if the act of the Commissioner in fixing the amount of the valuation is a judicial act, and therefore binding upon all parties affected by it, why is not his decision as to other matters necessary for the determination of the value equally binding ? His valuation, in the words of Holmes, L.J., involves " the consideration *and decision* of questions of law and fact." Are these subsidiary decisions not equally judicial in their character ? And if, as it is argued in this case, they are not binding upon anybody, what is the object of all the elaborate provisions for an appeal from his decision in every case ? The grounds of the appeal, which is allowed, may not only be the amount of the valuation, but an inaccurate statement of area, or inaccurate description of any rateable hereditament, or any other cause whatsoever (15 & 16 Vict. c. 63, sect. 19). It is true that this enumeration of the various grounds of appeal occurs in the section dealing with the appeal to the Commissioner himself for a reconsideration of his first decision ; but I think it must also apply to the right of appeal to Quarter Sessions conferred by the 22nd section of the Valuation Act, 1852, for the determination of the nature of the hereditament must affect the amount of the valuation. Portion of a railway cannot be valued on the same principle as houses and buildings are directed to be valued by the 11th section of the same Act.

How could the Commissioner ascertain the rent for which one year with another 100 perches of a railway might be reasonably expected to let from year to year, as he is directed to do in the case of houses and buildings? Yet it is admitted here that his decision as to the amount of the valuation is binding and conclusive, though it is contended that his decision as to whether the subject-matter is or is not a railway is not so. I cannot think that such an interpretation of the Acts is a reasonable one.

Again, it is admitted that if an appeal be taken to Quarter Sessions from the decision of the Commissioner of Valuation, and such decision is affirmed by that tribunal, it becomes thereby, in the words of the Act, "conclusive and binding on all parties to all intents and purposes whatsoever" (sect. 23). This must be so not only as regards the amount of the valuation, but as regards other matters also, such as the description of the rateable hereditament. The strange result would follow, if the contention of the appellants here were established, that portions of the revised lists would be given a decisive effect which was denied to other portions; such cannot, I think, have been intended as the effect of the provisions of the code.

The conclusion I come to from reading all the provisions of the Valuation Acts is that it was intended by Parliament that the decisions of the Commissioner of Valuation on all questions within his jurisdiction to decide were to be conclusive and binding upon all persons affected, unless they were appealed from in the prescribed manner and within the prescribed time. The intention further was, in my opinion, that if an appeal were taken the decisions of the appellate tribunal were to have the same effect as the decisions of the Commissioner would have had if unappealed from. I think, therefore, that the judgment entered for the plaintiff in the Court below was correct and should be affirmed.

Solicitors for the plaintiff: *Shields & Murnaghan.*
Solicitor for the defendants: *C. Bailie Gage.*

R. ST. J. C.

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Feb. 17, 24.

In the GOODS of JULIA TOOLE.

Practice—Administration—Right to—Probate Act (Ireland), 1857, *s.* 78—*Need for* uberrima fides *on* ex parte *application—Accounting party.*

There must be *uberrima fides* on an *ex parte* application.

Where an applicant for administration under sect. 78 makes a statement, subsequently contradicted by medical testimony, as to the incapacity of another next-of-kin, his application will, on this ground alone, be refused.

The Court will not grant administration to one who is himself an accounting party.

Application on behalf of John Dixon, that letters of administration intestate to Julia Toole be issued to the applicant. The said Julia Toole died on the 27th November, 1912, without parent or brother, leaving Margaret Toole her lawful and only sister and John Dixon a lawful nephew, child of a pre-deceased sister, her surviving. The application was made in the first instance *ex parte* under section 78, and was supported by an affidavit in the following terms:—

I, John Dixon, of Castlefish, Kilcullen, in the county of Kildare, farmer, aged forty-five years and upwards, make oath and say as follows:—

1. That the above-named Julia Toole, late of Grangemore, Brannockstown, in the county of Kildare, spinster, died on the 27th day of November, 1912, intestate, leaving no parent, grandparent, or other ascendant, and leaving Margaret Toole, her lawful sister, and no other sisters or brothers surviving, and leaving me, this deponent, and Bridget Fitzharris, Thomas Dixon, Michael Dixon, James Dixon, Maria Dixon, and Margaret Flood, the lawful children of Mary Dixon, otherwise Toole, a lawful sister of the said Julia Toole, deceased, who predeceased her, and John Keegan, Peter Keegan, and Maurice Keegan, the lawful

children of Kate Keegan, otherwise Toole, another lawful sister of the said Julia Toole, who predeceased her, and all of whom were the only next-of-kin of the said deceased.

2. That the assets of the said Julia Toole, deceased, consist of a farm of land, being part of the lands of Grangemore, containing 93A. 0R. 12P., or thereabouts, statute measure, situate in the barony of South Naas, and county of Kildare, held as a tenancy from year to year at the yearly rent of £58, and which is value for about £600, and also the stock, chattels, and effects thereon, value for about £300, making the entire value of the personal estate in or about £900.

3. That the said Julia Toole resided with her said sister, Margaret Toole, and the said Margaret Toole is now in possession of the entire estate and effects, and has been selling the stock and wasting the property without having applied for or obtained letters of administration. I refer to a copy of a letter written by my solicitors to Mr. Daniel P. Blayney, who acted as solicitor for the said Margaret Toole, to his reply thereto, upon which, marked respectively "A" and "B," I have endorsed my name before swearing this affidavit. I say that the said Margaret Toole, who resides at Grangemore aforesaid, is about eighty-four years of age, and is and has been for a considerable time past a person of weak mind, and incapable of properly discharging the duties of administratrix.

4. I say that all my brothers and sisters above mentioned, and who with myself are entitled to one equal third part of the personal estate of said deceased, are satisfied that a grant of letters of administration should issue to me, this deponent, and I also believe that John Keegan and Peter Keegan, who with their brother, Maurice Keegan, who is a person of unsound mind, represent another third part of the personal estate, would be satisfied that a grant of administration should be issued to me, this deponent, in preference to the said Margaret Toole.

5. I say that I am prepared to give security to the Court for the discharge of the duties of administrator.

6. I, therefore, pray this Honourable Court for an order that a grant of administration issue to me, this deponent, in priority

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to the said Margaret Toole, or, in the alternative, that a citation do issue to the said Margaret Toole to show cause why such grant should not issue to me this deponent.

Sworn, &c.,

JOHN DIXON.

The letter exhibited in the affidavit was as follows:—

"NAAS, *6th January*, 1913.

"Julia Toole, deceased.

"DEAR SIR,

"Referring to your letter of the 4th December, in which you stated that you were about applying for administration in this case, we think it right to let you know that we are acting for a number of the next-of-kin, namely, the seven children of Mary Dixon, otherwise Toole, and the three children of Mrs. Keegan, otherwise Toole, and that, having regard to the fact which is probably known to you, that your client labours under the disadvantage of being eighty-three years of age, of being totally deaf and being heavily addicted to drink, which renders her for the greater part of her time incapable of attending to business, we have found it necessary to enter a caveat against the grant issuing to her, unless she satisfies the Court as to her competency, and the next-of-kin as to the security which she proposes to give.

"We are informed by our clients that your client is rapidly making away with the assets, and having regard to the circumstances to which we have called your attention, this is a state of things which cannot be allowed to continue.

"We would, therefore, ask you, without delay, if you really consider that your client is a person fit to be entrusted with the administration, and that she will give satisfactory security, to warn our caveat and make application to the Court that the grant should issue to her.

"Yours faithfully,

"BROWN & MCCANN.

"Daniel P. Blayney, Esq.,
"Solicitor, Naas."

Mr. Blayney's reply denied the incompetency of Margaret Toole to act.

The application coming on again on notice, an affidavit was produced on behalf of Margaret Toole, from a medical man of high standing, stating that Margaret Toole's condition had been misstated in John Dixon's affidavit and the letter therein exhibited, and that she was not deaf or of weak intellect. It was admitted on behalf of Margaret Toole that she had sold a portion of the assets, and retained the proceeds of the sale. It was now sought to have administration granted to her.

Hanna, K.C., for Margaret Toole :—

John Dixon's statement as to Margaret Toole's condition made on the *ex-parte* application has been disproved. The sale of portion of the assets was really in due course of administration. We are entitled to the grant.

T. Bodkin, for John Dixon :—

Margaret Toole being herself an accounting party to the estate cannot obtain administration.

MADDEN, J., intimated that he would allow the matter to stand for a week, to have another administrator suggested.

Feb. 24.

At the further hearing an application was made on behalf of Peter Keegan, another next-of-kin, which was supported by Margaret Toole. It was admitted that Peter Keegan was a marksman and had been three times convicted for drunkenness, but it was stated on affidavit that he had reformed in the last ten months, and given up drinking.

P. Kelly, for Peter Keegan.

MADDEN, J., stated that, though none of the applicants were really suitable, he would appoint Peter Keegan, administrator. His Lordship added that an applicant must show *uberrima fides* on an *ex parte* application; and the statement made on behalf of John Dixon, as to Margaret Toole's deafness and mental incapacity,

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had been disproved. On the other hand, Margaret Toole was disqualified as being herself an accounting party. He refused John Dixon his costs.

Solicitors for John Dixon: *Brown & M'Cann.*
Solicitor for Margaret Toole: *Daniel P. Blayney.*
Solicitor for Peter Keegan: *Lynch & Deering.*

A. E. C.

ELLIOTT *v.* STRABANE RURAL DISTRICT COUNCIL (No. 2) (1).

K. B. Div.
1912.
May 9, 13.

Labourers Acts—Maintenance of fences on lands compulsorily acquired—Liability of District Councils therefor—Incorporation of section 15 of Railways (Ireland) Act, 1864 (27 & 28 Vict. c. 71), in Labourers Acts.

A Rural District Council who take a plot of land under the provisions of the Labourers (Ireland) Acts, for the purpose of building thereon a labourer's cottage, and who erect thereon a properly constructed fence between the land so taken and the adjoining land of the owner from whom the plot was taken, are under no liability to the owner of such adjoining land to maintain such fence in an efficient state.

Section 15 of the Railways (Ireland) Act, 1864, which is incorporated in the Labourers (Ireland) Acts, by section 16 of the Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60), is applicable to railway companies taking land for the purposes of a railway, and does not apply to a District Council taking land for the erection of labourers' cottages.

CASE STATED by Holmes, L.J.

The following is a copy of the material parts of the case stated:—

Civil bill to recover damages by the plaintiff by reason of the breach by the defendants of their obligation to maintain a sufficient fence between the lands of the plaintiff in the townland of Carnadone in the county of Donegal, acquired by the defendants from the plaintiff under the Labourers (Ireland) Acts.

This case coming on before me, on appeal from a decree for £3 of the County Court Judge of Tyrone,

The following facts were stated to be admitted:—

That the defendant Council took two acres of land from the plaintiff in 1907, under the provisions of the Labourers (Ireland) Acts; that the fence dividing the two acres taken from other lands belonging to the plaintiff was erected on the two acres, and was

(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.

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originally properly constructed. That the fence was not properly maintained, having been allowed to get into disrepair and having become quite useless to prevent trespass. That the fence was in such a condition that hens, pigs, and other animals about the labourers' cottages could, and hens did, trespass. That the fence was useless to prevent animals on the plaintiff's holding from getting out and trespassing on the labourer's plot. That the plaintiff had been in the habit of making agistment and conacre lettings of the adjoining lands. That he was no longer able to do so in consequence of the state of the fence. That, under their agreement with the council, the labourers occupying the cottages were bound to keep the fence in repair. The labourer is in possession under agreement set out in the schedule to this case.

The defendants asked for a case stated on the above facts, and agreed in any and every event to pay the plaintiff's costs as between solicitor and client of having this case finally decided by the higher courts.

There was a note of evidence (so-called) handed in, which I append in a schedule.

No evidence was in fact gone into before me. I take the document to mean an admission of facts.

The questions I submit to the Court on the above facts are:—

1. Is there a duty upon the defendants (as between the plaintiff and the defendants, for breach of which the plaintiff can sue the defendants) to maintain the fences in a proper state of repair?

2. Are the defendants answerable in damages for breach of such duty by reason of the plaintiff's land being depreciated in value in consequence of the defective condition of the fences?

If the answer to both these questions be in the affirmative, the decree for £3 should be affirmed.

The statement referred to set out the names of two witnesses and the facts that each could prove; these facts were identical with those set out in the case stated.

The case originally came before the County Court Judge at Strabane, on a civil bill to recover the sum of £10 damages

sustained by the plaintiff by reason of the breach by the defendants of their obligation to maintain a sufficient fence between the lands of the plaintiff and lands acquired by the defendants under the Labourers (Ireland) Acts. The County Court Judge gave a decree for £3 against the defendant District Council; the latter appealed. On the application of the defendants this case was stated for the opinion of the King's Bench Division.

Wylie (with him, *Denis Henry*, *K.C.*), for the District Council:—

We say the Rural District Council is not liable to maintain the fences.

We admit that sect. 15 of the Railways (Ireland) Act, 1864, imposes a duty on a Railway Co. to maintain fences on land taken by them, and that this section is incorporated under the definition of "Lands Clauses Acts" in the Labourers Acts, but we submit that by the express terms of section 16 of the Labourers Act, 1883, the application of the section of the Railways (Ireland) Act, 1864, and the Lands Clauses Acts is limited to "purposes of purchase"; "purchase" includes compulsory acquisition, *R.* (*Coddington*) v. *Local Government Board* (1); the sections of the Lands Clauses Acts are concerned merely with the *acquisition*, and have no application to the subsequent management, of the land; we submit, secondly, that section 3 of the Labourers (Ireland) Act, 1896, provides that where lands are purchased for labourers' cottages, otherwise than by agreement, the provisions of the Lands Clauses Acts shall be deemed to be amended by the provisions contained in the second schedule of the Housing of the Working Classes Act, 1890, and that schedule is similar to section 8 of the Public Health (Ireland) Act, 1896, under which *R.* (*Kerry Co. C.*) v. *Leahy* (2) was decided, and we say therefore that *R.* (*Kerry Co. C.*) v. *Leahy* (2) is an express authority in our favour; we submit, thirdly, that section 15 of the Railways (Ireland) Act, 1864, is one of a series of sections, commencing with section 14 and ending with section 17, which from their terms it is manifest are specially

(1) [1902] 2 I. R. 222. (2) [1903] 2 I. R. 317.

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applicable to railways only and intended to be so applied, and such sections could not be applied to the objects of the Labourers Acts by a general incorporation of the Lands Clauses Acts.

Weir Johnston, and *Blood, K.C.*, for the plaintiff:—

Section 15 of the Railways (Ireland) Act imposes an obligation to maintain the fences separating land taken for a railway. A similar obligation is now cast on a Council taking over land for the purposes of the Labourers Acts; the latter part of the 15th section does not limit this obligation, it merely provides a special remedy during a short period, when no fence, or an insufficient fence, is erected; the section provides that the Railway Company "shall cause proper fences to be made and maintained"; if the section imposes an obligation to make, it also at the same time imposes an obligation to maintain; where is the provision relieving them from the maintenance of the fence they are bound to make? We submit sect. 15 of the Railways Act, 1864, has nothing to do with the mode of acquisition; it applies to all lands taken. [Counsel referred to *Wilkins* v. *Mayor of Birmingham* (1), and *R.* (*Crommelin*) v. *O'Neill* (2).]

Denis Henry, K.C., in reply.

May 13.

PALLES, C.B.:—

The question for our decision is, whether a district council who take a plot of land under the Labourers (Ireland) Acts, and erect a properly constructed fence between the land so taken and the adjoining land of the owner from whom it was taken, are under a liability to the owner of such adjoining land to maintain the fence in an efficient state.

It is of course admitted that, at common law, the owners of adjoining lands are not under any such liability to each other; and consequently that the liability, if it exists, is a statutory one. The enactment relied upon by the plaintiff, as imposing this liability, is sect. 15 of 27 & 28 Vict. c. 71, the Railways (Ireland) Act, 1864.

(1) [1883] 2 Ch. D. 78. (2) [1909] 2 I. R. 379.

That section, so far as it is material to the question here, is in these terms:

"Every railway company in Ireland shall cause proper fences to be made and maintained for separating the land taken for the use of the railway from the adjoining lands not taken."

The section also contains a provision granting a special remedy to the owner or occupier of any land adjoining a railway, who shall complain of the want or insufficiency of any such fence, within five years after the completion of the works of the railway and the opening of it for public use. He may present a memorial to the Commissioners of Public Works in Ireland, stating the ground of his complaint, and thereupon the Commissioners are to inquire into the subject-matter; and, if they shall so think fit, are to appoint an arbitrator to hear and determine the complaint, and provision is made for enforcing his award.

It is conceded, however, by the counsel on both sides, that this special remedy is limited to the case of omission to provide the *original* fence, or to *its* insufficiency, and does not apply to the present case. It may, therefore, be left out of consideration; I mention it only to show that it has not been overlooked.

Thus the question is, whether this 15th sect. has been so incorporated in our Labourers Acts as to impose upon a district council, taking lands under their compulsory powers, the same liability in respect of the maintenance of fences as if they were a railway company who had taken the land for the purposes of their railway. I am willing to admit that such a liability would not be an unreasonable one; but that is not the question here. The question is, whether such a liability is imposed upon a district council, having regard to the true construction of the Labourers Acts. If a district council is not under this liability, then the arbitrator appointed to determine the compensation to be paid by the council for the land taken may probably take that circumstance into consideration in fixing the amount of the compensation to be given for the land. That question, however, does not arise here.

Before referring to the Labourers Acts, it is right to mention sects. 68 and 69 of the Railways Clauses Act, 1845, 8 Vict. c. 20 —an Act which applies to railways only.

By sect. 68 of that Act, it is enacted that the company shall

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make, and at all times thereafter maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, the following works, *inter alia*, "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway."

There is a proviso at the end of the section, as there is also in the Act of 1864, that "the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway."

Then the 69th section provides that any difference respecting the kind and number of such accommodation works, or their dimensions or sufficiency, or respecting the maintaining thereof, shall be determined by two Justices.

So that, independently of the Act of 1864, there was an obligation imposed upon railway companies to make and to maintain such fences. The question that we have to consider is, whether such a liability is imposed upon a district council.

The first enactment material to that question is sect. 16 of the 46 & 47 Vict. c. 60—the Labourers (Ireland) Act, 1883. It empowers "any sanitary authority," an expression within which a district council now comes, to purchase for the purpose of the Act any lands within their district; and for the purpose of such purchase incorporates with the Act "the Lands Clauses Acts." The expression "Lands Clauses Acts" is defined by sect. 21 as meaning several Acts, including the Lands Clauses Consolidation Act, 1845, as amended by the Lands Clauses Consolidation Acts Amendment Act, 1860, and the Railways Acts (Ireland), 1851, 1860, and 1864.

The 3rd section of the Labourers (Ireland) Act, 1896, enacts that, for the purpose of taking lands compulsorily under this code, "the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement, shall be deemed to be amended by the provisions contained in the second schedule of the Housing of the Working Classes Act, 1890."

It was argued upon the hearing of a civil-bill appeal before

Lord Justice Holmes between the parties to the present litigation, that this amendment excluded from incorporation certain sections (including section 15 of the Act of 1864); but this argument was rejected by the learned Lord Justice, and has not been repeated here. Speaking for myself, I may say that I entirely agree with that decision.

In result, then, although the code of Labourers Acts is a complicated one, the question here is not involved in that complication. It depends upon the effect of the incorporation in the Act of 1883 of the Railways (Ireland) Act, 1864.

To determine that question it is necessary to consider, as a whole, the three Railways (Ireland) Acts of 1851, 1860, and 1864.

The preamble of the Act of 1851 recites, *inter alia*, that "it is expedient that some provision should be made for ascertaining the purchase-money or compensation to be paid *by railway companies* in Ireland for the lands *required for their undertakings*," and then proceeds to make many provisions for that purpose which it substitutes for provisions contained in the Lands Clauses Act of 1845; and it enacts that those provisions "shall apply to every railway in Ireland authorized to be made by any Act . . . or which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such railway," and directs that "this Act shall be incorporated with and form part of the Acts authorizing the said undertakings." From beginning to end it is entirely a Railway Act.

The next Act to be considered is the 23 & 24 Vict. c. 97, the Railways Act (Ireland), 1860, which makes the Act of 1851 perpetual, with certain provisions which are immaterial to the question here. It, too, is entirely a Railway Act.

This brings me to the Railways Act (Ireland), 1864, the 27 & 28 Vict. c. 71, which is now really the only Act governing the question. It recites that it is expedient that the Acts of 1851 and 1860 should be amended, and the provisions thereof extended; and then sections 1 to 12 amend the provisions of the previous Acts, principally in respect of the proceedings upon a traverse to an award; and in all those sections, from section 1 to section 12 inclusive, the word used is not "railway company" but "company,"

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and section 13 enacts that "in the construction of the Railways Act (Ireland), 1851, and of the Railways Act (Ireland), 1860, and of this Act, the expression 'company' shall include any parties, whether company, undertakers, commissioners, drainage board, corporation, or private persons, empowered to execute any work or undertaking, and to take or use any lands, mills, or other hereditaments compulsorily under the provisions of any general or special Act of Parliament, already or hereafter incorporating the said recited Acts and this Act or any of such Acts."

Thus, by one broad enactment, the Legislature extended to every person or body of persons entitled to take land or other hereditaments compulsorily the general provisions of the Acts of 1851 and 1860, which previously had application to Railway Companies only. The remaining sections, 14 to 17, of the Act refer, not to companies generally, but to a particular class of companies, viz., railway companies.

Section 15 is that upon which this case turns. It begins:—

"Every *railway company* in Ireland shall cause proper fences to be made and maintained for separating the land taken for the use of the *railway* from the adjoining lands not taken, and shall also provide and maintain proper drains or other passages either over or under or by the sides of the *railway* to convey water from or to the lands lying near or affected by the *railway*, in the same manner and to the same extent as it was conveyed from or to the said lands before the making of the *railway*, or as near thereto as the case may be" (evidently referring to the powers of railway companies, under their Acts, to divert streams), "and in case any owner or occupier of such land shall complain of the want of or insufficiency of any such fences, drains, or passages, it shall be lawful for such owner or occupier, within five years after the completion of the works of any *railway* and the opening of the *railway* for public use, to present a memorial to the Commissioners of Public Works in Ireland stating the ground of his complaint; and, thereupon, the Commissioners shall inquire into the matter of such complaint, and if they shall so think fit, the said Commissioners shall appoint an arbitrator to hear and determine the matter of the said complaint."

The next section has reference to the powers and duties of such an arbitrator, who is not the arbitrator mentioned in the Acts of 1851 and 1860, but the arbitrator appointed under the previous section; and the 17th section directs that the Company shall make all such fences, drains, and passages as by the award of the arbitrator they shall be directed to make; but no company shall be required to make the same in such a manner as will prevent or obstruct the working or using of the *railway*.

Now, this section prescribes the liability and the remedy; and it is *in pari materia* with sections 68 and 69 of the Railways Clauses Consolidation Act, 1845.

In my opinion it is absolutely impossible, by any rule of construction, to treat the words "Railway Company" in this section as including any person or body within section 13, or as meaning a company generally, or to extend the liability imposed by that section upon Railway Companies to the persons or bodies described in the 13th section. There is a clear distinction drawn in the two parts of the Act—between the part which deals with "Companies, undertakers, drainage boards, corporations, or private persons" generally, and the part which deals with Railway Companies specially. In my opinion, neither from the express words nor the object of the enactment, is there any reason why such a liberty should be taken with the words of the section, when the Legislature drew a marked distinction between the two classes of "Companies," as to hold that, for the purpose of construction, there is no distinction.

I now come to the consideration of the Labourers Acts. According to the present system of drafting Acts of Parliament, the Acts of 1860, 1861, and 1864 are incorporated in their entireties; but assuming, as I do, that every word in them is incorporated, I hold that there is no subject-matter in the present case upon which the 15th section is to operate. There is no body which in relation to the lands taken answers the description of "Railway Company"; and no structure which is a "railway."

I have considered the case with great care, as we were informed that Lord Justice Holmes, in the previous case, had adopted the other construction. It is right to say, however,

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that the objection then urged to the applicability of the section was not that argued here, but was one founded on the contention that the incorporation of the Act of 1864 was repealed by the Act of 1896. We cannot refer to that decision as one affecting the question argued in the present case.

The decree given by the County Court Judge must be reversed; but in accordance with the undertaking given by the appellants to Lord Justice Holmes, they must pay the respondent's costs in this Court.

KENNY, J:—

The question which the "case stated" asks us to answer is whether there is a duty cast on the local authority, as between it and an adjoining owner of a labourer's plot, for the maintenance of the fences enclosing the plot, in respect of the breach of which an action would lie. It is admitted that if such a duty exists, it cannot be referred to any common law liability, but must be the creature of statute, and the only statute, in addition to the 68th sect. of the Railways Clauses Act, 1845, to which we have been referred as containing a provision for the maintenance of fences by the undertakers of a work is the 15th sect. of the Irish Railways Act of 1864, which enacts that "Every railway company in Ireland shall cause proper fences to be made and maintained for separating the land taken for the use of the railway from the adjoining lands not taken." There is, no doubt, another provision as to fences embodied in the 5th sect. of the Labourers Act, 1896, but it deals only with the relations between the local authority and its tenants, and in no way affects the question we have to consider.

The code of Acts "to better the condition of labourers in Ireland" commences with the Act of 1883, the 16th sect. of which contemplates both the voluntary and compulsory purchase of lands by the local authority: (*R.* (*Coddington*) v. *The Local Government Board*(1)); and in terms incorporates the Lands Clauses Acts, which by sect. 21 are interpreted as including, *inter alia*, the Irish Railways Act of 1864. The material question on such

(1) [1902] 2 I. R. 222.

incorporation is, whether the 15th sect. of the latter Act can be regarded as applicable to a case where the undertaking is not a railway. It is admitted by counsel for the plaintiff in this action, that if the Act be interpreted without reference to the Labourers Acts, this section and also the 14th, 16th, and 17th are, notwithstanding the extension of subjects in sect. 13, confined to railway companies pure and simple. This is plain when they are contrasted with the other sections preceding sect. 13. Down to that section, the expression "railway company" is not used. Each section speaks of the "company" without any qualifying word; and in sect. 13 it is provided that "company" is to include any parties,—whether company, undertakers, commissioners, corporations, or private persons, empowered to execute any work or undertaking and to take or use any lands; but there is no express meaning given to the words "railway company." It is significant to find this interpretation clause in this part of the Act if it was intended to make company synonymous with "railway company," for it is followed by those sections in which the limited expression "railway company" is used as if by contrast to the more general word "company" in the preceding part of the statute. It therefore seems impossible to contend that the 15th sect., standing by itself, extends to any undertaking except a railway company.

Once this construction is recognized, I do not see how the fact of incorporating the Act of 1864 with a subsequent statute which has for its subject-matter an undertaking of a different character from that of a railway can alter that construction. In order to do so, the expression "sanitary authority" in the 16th sect. of the Act of 1883 must be read into the 15th sect. of the Act of 1864, notwithstanding that there is no interpretation clause dealing with the words "railway company," and that these latter words have a subject-matter of their own to operate on, separate and distinct from all other undertakings that would be included within the previous sect. 13. Not alone is it necessary to substitute those words, but in subsequent parts of the section the word "railway" must be displaced and some words such as "labourer's cottage" must be inserted in its place in order to make the section at all coherent. But, even with those displacements, the section would seem to me to be a wholly impossible one to adapt to the

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purposes of the Labourers Acts. This Court has already in *R.* (*Kerry County Council*) v. *Leahy* (1) decided that having regard to the incorporation of the second schedule to the Housing of the Working Classes Act, 1890, with the Labourers Acts, and the amendment and partial displacement thereby of the provisions of the Lands Clauses Acts with respect to compulsory purchase, an arbitrator has no power to award the making of accommodation works, such as fencing,—but that decision leaves open the question we have to decide in the present case, which, in my opinion, should be determined in favour of the defendants, the Rural District Council.

WRIGHT, J.:—

I concur, and I desire to add merely a word or two. The only matter that appears to me necessary to decide is what effect is to be given to section 15 of the Railways Clauses Act, 1864. That Act may be described as a double one. The first twelve sections apply to several companies, including railway companies, that have a compulsory power of purchasing land, and it extends to such companies certain advantages that they did not previously possess, such as rights of traverse, special jury, and case stated. Following section 13—the definition section—comes what almost amounts to a separate statute, namely, sections 14 to 17, inclusive, all of which, as clearly as words can express it, apply to railway companies, and railway companies alone. The public object of imposing a liability upon railway companies to make and maintain fences has already been pointed out by my Lord Chief Baron. Admitting that the whole of the Railways Clauses Act, 1864, has been incorporated by the Labourers Act, 1883, it appears to me impossible, without distorting the language, to hold that section 15 of the former Act applies to such a case as the present. Consider what such a construction would mean. Are we to strike out "railway" and say "any" company? Are we to disregard the expressed object of the section, namely, the separation of the lands for the use of the railway from adjoining lands? Are we, in fact,

1) [1903] 2 *I.* R. 317.

to give effect to the first two or three lines, and practically strike out the remainder of the section? In my opinion, sections 14 to 17, inclusive, are really equivalent to a separate Act, and are not applicable to any company except that for which they were enacted, namely, a railway company. Accordingly, I entirely concur in the judgment of the other members of the Court.

Solicitors for the plaintiff: *Elliott & Clarke.*

Solicitors for the District Council: *T. T. Mecredy & Son.*

J. M.

WILLIAM DUNNE, R. I. C., APPELLANT; THOMAS LEE, RESPONDENT (1).

Principal and agent—General Dealers (Ireland) Act, 1903 (3 *Edw.* 7, *c.* 44)—*Agent of a licensed general dealer purchasing old metals.*

Where a person, not being himself a licensed general dealer under the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), purchases from an individual a quantity of lead less than 112 lb., such purchase, if made by the purchaser as agent of a licensed general dealer, is not a contravention of the General Dealers (Ireland) Act, 1903. A licensed general dealer under that statute can deal by an agent or servant not only upon his licensed premises but also outside those premises, the dealer being responsible for the recording and accuracy of the entries required by the statute in respect of purchases so made by his agent or servant.

CASE STATED for the opinion of the Court at the instance of the appellant, pursuant to the Summary Jurisdiction (Ireland) Act, 1857 (20 & 21 Vict. c. 43).

At a Petty Sessions holden for the Petty Sessions District of Naas, County Kildare, on the 2nd December, 1912, before Mr. Hendrick Aylmer and Mr. Stephen Brown, two of the Justices of the Peace for that county, the respondent Thomas Lee was charged by a summons "for that on the 15th day of October, 1912, at Kill, in the said county, you the said defendant did unlawfully purchase a quantity of lead from one Richard Lowe, to wit

(1) Before MADDEN and WRIGHT, JJ.

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62 lb. weight, being a less quantity than 112 lb. weight, contrary to the statute."

At the hearing of the complaint Constable Bartholomew Connor, of the Royal Irish Constabulary, deposed that he saw the respondent in the Dewdrop Inn yard, at Kill, on the 15th October, 1912; the respondent was purchasing lead from the manager of the Dewdrop Inn, and put the lead purchased by him into a cart he had with him; that he, the constable, asked the respondent how much lead he had, to which the respondent replied that he had 4 stone and 6 lb., for which he had paid at the rate of 1*s.* 4*d.* per stone; the lead consisted of tea and pipe lead. When asked what he was going to do with the lead, the respondent said he would sell it to Goldstein at Naas. He was asked by the witness if he had a general dealer's licence, and he said he had, but when asked to produce it, he could not comply; and when asked for further authority for buying the lead, he said he had no authority, and that he was buying the lead for a "Jewman" at Naas. The cart in which the respondent put the lead had the name of Goldstein upon it. Morris Goldstein, examined for the defence, deposed that he was a licensed general dealer at Naas, and that the respondent was his agent. On the 14th October, 1912, the respondent told him about some lead at Kill. On the 15th October, 1912, he gave the respondent 10*s.*, and sent him, with a man named David Lawlor, to Kill, to purchase the lead; he gave them his cart to bring the lead back. The respondent paid 5*s.* 10*d.* for the lead, and he gave the respondent 1*s.* 2*d.* commission. The respondent was not constantly in his employment; he only employed him occasionally, and gave him a commission on what he brought him. Sometimes he bought from the respondent directly. On cross-examination the witness admitted that the entry of the purchase as of 14th October, 1912, made in his books was a mistake, as he did not receive the lead till the 15th October, 1912.

David Lawlor deposed that he was a rag and bone gatherer, and sometimes acted as agent for Morris Goldstein, to buy rags and bones. He went to Kill on the 15th October, 1912, with the respondent for the lead on Morris Goldstein's instructions. They had the latter's cart; Goldstein gave the respondent money to buy the lead.

The witness further deposed that he never bought lead for Goldstein, and admitted, on cross-examination, that he had been convicted at Newbridge about four years previously for stealing lead.

Richard Lowe, manager of the Dewdrop Inn, deposed that on the 15th October, 1912, the respondent purchased from him 62 lb. of lead. The respondent told him that the lead was purchased for Goldstein. The respondent put the lead in a cart which bore Goldstein's name.

The Justices who heard the complaint were of opinion that the respondent acted as agent of Goldstein in the purchase, Goldstein being a licensed general dealer, and as such permitted to buy less than 112 lb. of lead. The appellant contended that if a general dealer could employ an agent, it would be impossible for the police to enforce the provisions of the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), and the general dealers could not comply with the provisions of section 2, sub-section 2, of that Act. The Justices held that the Act contemplated a general dealer employing an agent, especially in section 5, sub-section 2, and section 9, sub-section 2, and gave judgment in favour of the respondent. Upon the application of the appellant a case on the above facts was stated for the opinion of the Court as to whether the decision of the Justices was right in law.

Gerald Horan (with him *The Solicitor-General*), for the appellant:—

Section 1 of the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), requires every general dealer to be licensed, and by section 12 of that Act a general dealer is defined as a person who, otherwise than by public auction held by a licensed auctioneer, buys or sells *inter alia* quantities of lead of less than 112 lb. Goldstein undoubtedly was a licensed general dealer under the statute; but Lee had no license. Lee was not a general dealer, and cannot escape liability by showing he acted as agent of Goldstein. Every general dealer who operates outside his licensed premises must operate personally; there would be no check on dealing in old metals if agents outside the licensed premises could be employed. It is true that sections 8 and 9

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of the Act of 1903 provide for offences by agents of general dealers, but that must be intended to refer to dealings on the licensed premises. In *Hall* v. *O'Brien* (1) it was no doubt decided that a general dealer could himself deal outside his licensed premises; but that does not extend to dealings outside through an agent who is not a licensed general dealer. Under the rules of 1904 (S.R.O. 1904, 256) a personal application is required for the licence and the renewal; that shows that the licence, which is the authority avoiding the liability in such a dealing as the present, is a personal licence and a personal authority which cannot be extended or delegated.

James Sealy, and *J. B. Falconer*, *K.C.*, for the respondent :—

The summons is bad; the respondent is not charged as a general dealer; even if the summons were good, there is no evidence that he ever dealt in old metals before. The gist of the offence is, that the offender is a general dealer. There is nothing to show that dealings may not be made, or had through an agent of a general dealer. Sections 8 and 9 of the Act of 1903 show a recognition of the employment of agents by general dealers; and the contention advanced by the appellant is utterly inconsistent with the general principle and law of agency.

The Solicitor-General, in reply :—

The mischief against which the statute was framed and enacted was an unchecked purchase of small quantities of old metals or lead which could be easily stolen; the object of the statute is to subject dealers in small quantities of these metals to provisions requiring a licence and supervision. Under the rules of 21st April, 1904, the applicant for a licence must specify the premises upon which he intends to conduct his business; under section 2, sub-section 2, of the statute the general dealer must enter in his book the name and address of the person from whom the article is purchased, and the day and hour of the purchase; that points to personal knowledge, and, read with the provisions of sections 8 and 9, shows that the agent or servant referred to in those sections are agents or servants acting as such on the licensed premises.

(1) [1906] 2 I. R. 6.

MADDEN, J.:—

This case has been well argued, and is one of general importance. The respondent, Lee, undoubtedly, would have been liable, under the General Dealers (Ireland) Acts, for the purchase of the lead, if he had not acted as the agent of a general dealer, or if we were to hold that a licensed general dealer could not act through an agent. It would be certainly a remarkable conclusion if we were to decide that there was such an entire difference between a licensed general dealer and every other dealer. Something must be shown in the Act which places the licensed general dealer at the disadvantage of being precluded from employing an agent in the conduct of his business. So far from there being any such provision in the Act, the 9th section of the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), recognizes dealings by an agent or servant for the purpose of creating an offence. The Solicitor-General admitted that if a dealer can act unlawfully through an agent he can act lawfully; but he confined his admission to dealings on the licensed premises of the dealer, and argued that dealings by the dealer outside his premises must be personal dealings.

Every licence is, in one sense, a personal licence. It is given to an individual and confers powers upon an individual; but it does not follow that these powers can be exercised only by the licensee in person. So the Solicitor-General contends that under the General Dealers (Ireland) Act they must be personally exercised, and in support of that contention he has cited section 2, sub-section 2, of the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), which contains very particular enactments as to entries to be made by the general dealer in his books of the description and place of abode of the person from whom the purchase is made, and the day and hour of the purchase. The learned Solicitor-General contends that these provisions as to the day and hour point to personal knowledge and personal action. I can see no difficulty in carrying out these provisions where purchases are made by an agent outside the licensed premises. The general dealer's agent would be bound to take for his principal a note of the particulars required in connexion with his business,

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the principal would be bound to make the requisite entries, and would be responsible for their recording and accuracy. This would be an ordinary business procedure, analogous to the case of a canvasser for orders, who takes a note of the person ordering and the date of the order for his principal. Here the agent would have to take note of the day and hour of the purchase in his note-book, and the principal must enter these particulars in his proper books under the Act.

I cannot see any provision in the Act which confines dealings through an agent to dealings on the premises of the dealer. If the Solicitor-General could show us that a general dealer could not deal outside his licensed premises, we might be driven to such conclusion; but this proposition is negatived by the case of *Hall* v. *O'Brien* (1).

I am of opinion that there is no such restriction as has been contended for, upon the employment of an agent by a licensed general dealer.

WRIGHT, J., concurred.

Solicitor for the appellant: *Malachy Kelly.*
Solicitor for the respondent: *William A. Lamphier.*

C. N. K.

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COLLES AND ANOTHER *v.* HORNSBY AND ANOTHER (2).

Oct. 29, 30, 31. Nov. 27.

Land Purchase—Superior interest—Fee-farm rent—Redemption—Purchase-money insufficient to provide for full redemption price—Right of owner of rent to sue on covenant for payment—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *section* 16, *sub-s.* 1—*Land Law* (*Ireland*) *Act*, 1896 (59 & 60 *Vict.* *c.* 47), *section* 31, *sub-s.* 1.

Where before the making of a vesting order under section 16 of the Irish Land Act, 1903, the lands thereby vested in the Land Commission are held

(1) [1906] 2 I. R. 6.
(2) Before PALLES, C.B., and GIBSON and BOYD, JJ.

under a fee-farm grant reserving a rent, which grant contains a covenant for its payment and constitutes a "superior interest," such rent, until redeemed by full payment of the redemption price fixed, is, as regards all persons other than the Land Commission and those claiming through it, to be deemed to continue as a rent, and the covenant continues to subsist as if the rent had not ceased against the land.

So held, by Palles, C.B., and Boyd, J., Gibson, J., *diss.*

A fee-farm grant made in the year 1866, granting certain lands to the grantee and his heirs at the yearly rent of £150, contained a covenant by the grantee for himself, his heirs, executors, administrators, and assigns, that the grantee, his heirs or assigns, would at all times during the estate thereby granted pay the said rent to the grantor, his heirs, or assigns, by half-yearly payments. The lands comprised in the grant subsequently became vested in B., and formed part of his demesne. An agreement was entered into between B. and the Irish Land Commission, under the provisions of section 3 of the Irish Land Act, 1903, by which the Land Commission agreed to purchase the demesne from B. and re-sell it to him. An order of the Land Commission was made vesting the lands in the Land Commission, and on the same day a further order was made vesting them in B. in fee-simple. By an order of the Estates Commissioners the sum of £2300 was fixed as the selling value of the part of the demesne consisting of the lands comprised in the fee-farm grant. By a subsequent order of the Land Commission it was ordered that the rent of £150 reserved by the grant, together with the value of the covenants therein, should be redeemed at the price of £3000, and by a further order of the Land Commission the sum of £2300 was placed to the separate credit of the redemption price. The plaintiff, who was the devisee of the grantor in the fee-farm grant, refused to accept this sum, and brought the present action against the personal representatives of the grantee, claiming as due under the covenant in the grant a half year's rent which had accrued due subsequently to the date of the vesting order. The action was tried by Dodd, J., without a jury, and he gave judgment for the defendants. On a motion by the plaintiff to have this judgment set aside, and judgment entered for him;

Held, by Palles, C.B., and Boyd, J., Gibson, J., *diss.*, that the plaintiff was entitled to judgment for the amount claimed.

MOTION to enter judgment for the plaintiffs, or in the alternative for a new trial.

The action was brought on a covenant contained in an indenture, dated the 3rd August, 1866, made between the Rev. William Morris Colles of the one part, and Robert Higginson Borrowes of the other part, whereby the said Rev. William

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Morris Colles granted to the said Robert Higginson Borrowes, his heirs and assigns for ever, part of the lands of Grangemore, in the County of Kildare, containing 49A. 2R. 28P. Irish, subject to the yearly rent of £150, payable half-yearly, and the said R. H. Borrowes, for himself, his heirs, executors, administrators, and assigns, covenanted with the said W. M. Colles, his heirs and assigns, that the said R. H. Borrowes, his heirs or assigns, should from time to time, and at all times for ever thereafter during the estate thereby granted, pay or cause to be paid to the said W. M. Colles, his heirs or assigns, the said yearly rent of £150 by two equal payments, on every first day of May and first day of November in every year. The Rev. W. M. Colles died in the year 1889, having by his will devised all his property in the County of Kildare to one of the plaintiffs, William Morris Colles. The other plaintiff, Charlotte Ellen Colles, was executrix of the will. The defendants were the personal representatives of R. H. Borrowes. The plaintiffs claimed the sum of £75, being one half-year's rent up to the 1st November, 1911, due under the said covenant.

After the making of the grant of 1866, the lands comprised therein became incorporated with the Borrowes demesne, which subsequently became vested in Sir Kildare Borrowes. On the 25th June, 1909, Sir Kildare Borrowes, who had entered into agreements under the Land Purchase (Ireland) Acts for the sale of the tenanted portion of his estate in County Kildare to the tenants thereon, applied to the Irish Land Commission, under the provisions of section 3 of the Irish Land Act, 1903, for the purchase by the Land Commission from him of his demesne, including the lands comprised in the indenture of 1866, and the re-sale to him of the same, and he undertook to re-purchase the demesne from the Land Commission at the price of £19,022, of which the Land Commission were to advance £15,218. On the 29th June the Land Commission agreed to purchase the demesne for the sum of £19,022, and by an order of the Land Commission of the 17th February, 1910, the lands were vested in the Land Commission in fee-simple. By a further order of the same date, the lands were vested in Sir Kildare Borrowes in fee-simple,

charged with the repayment to the Land Commission of the advance of £15,218 and interest.

By an order of the Estates Commissioners of the 12th June, 1911, the sum of £2300 was fixed as the portion of the total purchase-money of £19,022, representing the selling value of the lands comprised in the indenture of 1866.

By an order of the Land Commission, dated the 15th June, 1911, it was ordered that the rent of £150 per annum reserved by the indenture of 1866, together with the value of all covenants therein, should be redeemed at the price of £3000.

On the 25th July, 1911, it was further ordered that the said sum of £2300 should be placed to the separate credit of the said redemption price, and on the 4th August, 1911, this sum of £2300 was transferred to such separate credit.

The plaintiffs refused to accept the sum of £2300, and the writ in the present action was issued on the 16th December, 1911. It claimed £75, being one half year's rent due under the covenant in the indenture of the 3rd August, 1866, from 1st May, 1911, to 1st November, 1911. The statement of claim set out the indenture of 1866; the devise by the will of the Rev. W. M. Colles to the plaintiff, W. M. Colles; the grant of probate of this will to the plaintiff, Charlotte Ellen Colles; it also set out the death of R. H. Borrowes, and that the defendants were his personal representatives: and concluded with the statement:—"The sum of £75 is now due to the plaintiffs by the defendants, on foot of said covenant for the half year up to and ending 1st November, 1911."

The statement of defence, in addition to a plea of *plene administravit* with which the present report is not concerned (see note, p. 221), as a further defence referred to the vesting orders of the 17th February, 1910, and alleged that upon their execution all the estate and interest of the plaintiffs in the said lands, and all leases, tenancies, estates, and interests dependent thereon, including the estate granted by the indenture of 1866, and all covenants therein contained, absolutely ceased and determined, and the said lands became vested in Sir Kildare Borrowes, his heirs and assigns for ever, and the plaintiffs had no interest or

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estate in the said lands during the period of the alleged accruing of the rent sued for, and were not at the commencement of the action, and are not, the heirs or assigns of the Rev. W. M. Colles in respect of the said lands. The statement of defence further set out the order of the 15th June, 1911, ordering the redemption of the rent, and fixing the redemption price at £3000; the order of the 25th July, 1911, ordering the sum of £2300 to be placed to the separate credit of the redemption price; and the transfer on the 4th August, 1911, of the said sum to such credit. It alleged that before the rent sued for became due, the rent of £150 and the covenant to pay the same were redeemed as aforesaid; that the plaintiffs' claim was satisfied before the commencement of the action by the said transfer of the said sum of £2300, and by the interest upon the said sum.

The action was tried before Dodd, J., without a jury. As the statement of claim contained no reference to the proceedings in the Land Commission Court, he adjourned the hearing to enable the full facts to be stated, and permitted the plaintiffs, if so advised, to put forward a claim that, in the events that had happened, they were entitled to have the sum of £700 raised out of the personal estate of the original lessee. The pleadings were amended, but no such claim was argued. Dodd, J., in his report, stated that it was disclaimed, counsel for the plaintiffs contending that neither Mr. Justice Wylie nor himself had any jurisdiction to grant any such relief, and the case was presented as a Common-law action upon a covenant.

In the statement of claim as amended paragraphs were added setting out the proceedings in the Land Commission, which the plaintiffs alleged were taken without the consent and against the will of the plaintiffs, and were instituted and carried on by Sir Kildare Borrowes solely for his own benefit. They alleged that if the defendants were right in contending that the rent had ceased to be further payable out of the lands, "the said result has been caused wholly by the action of the assignee of the covenantor, and that a breach of the covenant to pay the said rent has occurred, and that the defendants, as such personal representatives of Robert Higginson Borrowes, are liable for such

breach, and that the damages for such breach can be now ascertained once and for all." The plaintiffs claimed the sum of £75 in respect of the matter stated in the original statement of claim, and in the alternative, the sum of £700 damages, being the difference between the said two sums of £2300 and £3000, in respect of the causes of action alleged in the paragraphs added by the amended statement of claim.

Dodd, J., gave judgment for the defendants with costs. He delivered the following judgment:—

DODD, J.:— 1911. June 18.

The action as presented is an action in *covenant* at Common Law.

On the 3rd of August, 1866, Rev. William Morris Colles granted to Robert Higginson Borrowes, his heirs and assigns for ever, certain lands of Grangemore, county Kildare, subject to the yearly rent of £150 sterling, clear of all deductions, by two equal half-yearly payments. This indenture contained a covenant by the grantee for himself, his heirs, executors, administrators, and assigns, that he the said Robert Higginson, his heirs or assigns, should from time to time, and at all times thereafter during the estate thereby granted, well and truly pay, or cause to be paid, to the said William Morris Colles, his heirs or assigns, the said yearly rent of £150, by two equal payments, on every 1st day of May and 1st day of November in every year.

The action is brought by the devisees of the grantor against the personal representatives of the grantee.

The execution of the indenture, and the entry upon the lands pursuant to its terms, are not disputed. The defence relied on is in respect of matters that arose subsequent to the execution, subsequent, indeed, to the death of the grantee, by virtue of an Act of Parliament that was not passed till after his death, and at a time when his personal representatives had no interest of any kind in the lands. That was the Irish Land Act, 1903. Under the provisions of that Act the Estates Commissioners made on the 17th February, 1910, two vesting orders, one by which the said lands of Grangemore became vested in the Irish Land Commission

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in fee-simple, freed and discharged from all superior interests, and a second by which the said lands were vested in Sir Kildare Borrowes, Baronet, his heirs and assigns, freed and discharged from all such superior interests.

The defendants say there is now no lessor, no lessee, no rent, no covenant. The covenant is to pay during the estate thereby granted. The estate is determined. There is nothing now upon which the covenant can operate. No one is entitled to any rent. Not only is the estate of the grantee gone, the estate of the grantor is also gone. By a vesting order made by the Estates Commissioners the lands are now vested in Sir Kildare Borrowes in fee-simple, freed from all superior interests, including the covenant. Every effort that could be made by the plaintiffs in the Land Commission Court, and in the Court of Appeal, was made to prevent such a result, but in vain. But it is alleged that though the land is gone, the estate of the grantor gone, the estate of the grantee gone, the rent gone, the personal covenant to pay still remains. The argument may be stated somewhat in this way. The Land Commission by one of its jurisdictions has fixed the value of the land at £2300. The Land Commission by another of its jurisdictions has fixed the redemption-price of the rent, including the value of the personal covenant, at £3000. It has been decided that the Judicial Commissioner was within his powers in including the value of the personal covenant in his price. Indeed, it was at the instance of the plaintiffs this was decided. The sum required to make good the deficiency is £700. Till that is paid the covenant has not been in fact redeemed. It is freed from the land, but has a prolonged existence till £700 be lodged to the credit of the redemption account in the Bank, and unless and until that is done an action will lie on the covenant, and damages may be assessed. What I have to decide in this action is, whether the covenant does still exist as a covenant for this purpose and to this extent, or at all.

This contention is founded on the proposition that a lessee cannot, by his own act, deprive the lessor of the benefit of a covenant in the lease. Sir Kildare Borrowes got the lands by devise from the original lessee. Sir Kildare Borrowes has instituted such proceedings in the Land Commission Court

that the lessor has lost his rent, and all remedies against the land. It follows that the personal representatives of the lessee are answerable in damages.

The action is framed in what would, under the old system of pleading, be in covenant. Rent could be sued for in two ways. Either in *debt* upon the reddendum, the land being the debtor, as it was phrased; or it could be sued for in *covenant*, and judgment in covenant was in damages. The distinction between a judgment for money *in numero*, and a judgment for damages for not paying money *in numero*, does not, did not even in 1808 (the date of the first edition of Chitty on Pleading), seem substantial. *Rien in arrere* is a good plea in *debt* for rent, but not in *covenant*, because the latter action is for damages (Cowp. 558, 9). And yet, it is upon this distinction that the controversy in the present case turns. The lessor has been deprived of his remedy for rent by the acts of persons claiming under the lessee. He claims as damages the loss of one half year's rent; in the alternative, as the act of the lessee has destroyed rent for all time, he claims one capitalized sum of £700, representing the total loss.

This is not quite without authority, but is very old, almost black-letter law.

If a man assigned his interest in a lease to a third person, he could not be sued in rent, he could be in covenant. If his estate was taken out of him by acts outside his own action, it was suggested he was not liable either in debt or covenant. But it became firmly established, if it was his own fault that his interest in the lease was gone, he still was liable. The leading case was *Mills* v. *Auriol* (1). This case had once a place as a leading case in Smith's Leading Cases, but it has long since vanished as being obsolete in the present state of the law. Lord Mansfield had held in *Wadham* v. *Marlowe* (reported in 1 H. Bl., 437, but also more fully and correctly in a foot-note to *Boot* v. *Wilson* in 8 East, at p. 314), that an action in *debt* for rent would not lie against a bankrupt whose lease had by virtue of the statute become vested in the Commissioners of Bankruptcy, and had by them been sold to an assignee. As the law then stood, it was only debts due at the

(1) 1 H. Bl. 433 and 4 T. R. 94.

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date of the bankruptcy that were provable. Liabilities on covenants and contingent liabilities were subsequently brought within the matters from which a bankrupt could be relieved. The case therefore turned upon the common law, and the question was, Did the defendant's liability for the rent determine because the land out of which the rent issued was compulsorily taken from him by statutory power? Lord Mansfield held that the liability did cease; and the reasoning of his judgment, as it appears in East, applies as much to covenant as to debt. He cites with approval an *obiter* opinion of Mr. Justice Yates, who said that as the Commission and the proceedings under it had dispossessed the bankrupt of the whole estate, and rendered him absolutely incapable of performing the covenant, it would be a hardship if he should remain liable to it when he was disabled by the Act of Parliament from performing it; and Lord Mansfield, in adopting this, said further—"Legal reason is strong with the determination; for the estate is transferred and vested in the assignees by virtue of the Acts of Parliament respecting bankrupts; every man's assent is virtually included in an Act of Parliament, and therefore it is equivalent to an express assent. It was admitted on the part of the plaintiff that if the estate were divested out of the lessee purely by an act of law, without any fault of his, he would be discharged. We think this case must be so considered, for though the commission is founded on an act originally done by the defendant, viz., an act of bankruptcy, yet the Commissioners' assignment by virtue of the Act of Parliament is the actual and immediate cause of divesting the estate out of the bankrupt, and *in jure non remota sed proxima causa spectatur.*"

But in *Mills* v. *Auriol* (reported in 1 H. Bl., 433, and in the Exchequer Chamber in 4 T.R.), while the decision in *Wadham* v. *Marlowe* (1) was upheld on the ground that debt would not lie, it was held that an action for covenant would lie. If the lessee's interest in the land were taken out of him, because of attainder, or because of confiscation, or by reason of the bankrupt code, or by proceedings on a *fi. fa.*, or on elegit, the lessor could still sue on the personal covenant.

(1) 1 H. Bl. 437; 8 East, 347.

And in *Booi* v. *Wilson* (1), Lord Ellenborough followed *Mills* v. *Auriol* (2), and distinguished *Wadham* v. *Marlowe* (3) on the ground that it only decided that the action of *debt* on the reddendum would not lie against the lessee for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the Commissioners' assignment.

The statutory law has now made these decisions of course of no importance in bankruptcy. But the cases are of importance as being so far in favour of the proposition relied on by the plaintiffs that a man's own act in consequence of which by legal process his property is vested in someone else, cannot destroy a personal covenant in the lease to pay the rent reserved in the lease. I do not think the part of Lord Mansfield's judgment where he said that "if the estate were divested out of the lessee purely by an act of law, without any fault of his, he would be discharged," has been or can be impugned. The Land Act of 1903 was intended to induce landlords and tenants to come to agreements as to purchase of holdings, and the provision in section 3, by virtue of which the vesting order was made, was inserted to facilitate sale by bringing the owners of demesne lands within the benefit of the Land Purchase Acts. Is it a *fault* on the part of the personal representative of the grantee, if the owner of the land applies under the Act? It is an incident in a transaction which is supposed to be praiseworthy, rather than blameworthy. Landlords get a bonus for carrying on the policy.

Another comment has to be made upon this. In the cases cited the lease still continued. It was vested in the assignee of the Commissioners. Under the Land Acts of 1896 and 1903 the lease in this case is destroyed. It is completely gone, as a lease. There is no *rent* payable. And the covenant relied upon is to pay rent during the continuance of the lease. I am of opinion that when the lease is gone, the covenant to pay rent has gone with it.

So far I have been dealing with the interest of the *lessee*. But what of the interest of the lessor? After the grant of the reversion, the grantor cannot sue for breaches of covenant subsequently

(1) 8 East, 311.
(2) 1 H. Bl. 433.
(3) 1 H. Bl. 437; 8 East, 347.

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committed by the lessee or his assigns (Chitty on Pleading, 1st ed. [1808], p. 19). "We all knew" (says Chief Justice Monahan in *Rawson* v. *Grogan* (1)), "that in *covenant* it was a common mode of non-suiting the landlord to prove that since the execution of the lease he had mortgaged the premises." The same learned lawyer, in dealing with a distinction between a want of authority in the lessor to make the lease, which the tenant may not dispute unless and until he has been evicted, and matters subsequent to the lease that may bar the lessor's right to sue in covenant, says: "It is equally well established that the defendant, the tenant, may show—without showing any eviction—that since the making of the lease the landlord, the plaintiff, has conveyed his reversion in the premises to a third person, as purchaser, mortgagee, assignee in bankruptcy or insolvency."

If the lessor's interest were taken from him by an act of law, could he sue on the covenant? The Estates Commissioners acquired by statute the fee of the lands. The interest of the plaintiffs is gone. It is the same as if they had conveyed their reversion to the Estates Commissioners. And lest anything should turn upon the word "reversion," and it should be argued that this was really a fee-farm grant, a grant in fee, with a re-grant of a rentcharge, it may be well to add that the fee is gone from the grantor. From whatever point it may be presented, the plaintiffs now suing in covenant have no interest in the land.

I am of opinion, therefore, that the *grantor's* interest is gone from the grantor as well as the grantee's interest from the grantee. The rent is gone, and the covenant gone.

I think the case of *Rawson* v. *Grogan* (1) is decisive on the matter submitted for my adjudication. It is true that action was for rent, and not in covenant. Reliance was placed by the defendant, who was in possession of the lands, upon a conveyance under the Incumbered Estates Court Act, 12 & 13 Vict. c. 77, s. 28. The Court held that the estate of both lessor and lessee became at the same moment determined and extinguished. The provision of that section was continued in the Landed Estates Court Act, 1858 (section 61), and by section 8 of the Purchase of Land (Ireland) Act, 1885, a vesting order

(1) I. R. 3 C. L. 631, at p. 636.

is made as effectual in all respects as if it were a conveyance under the Landed Estates Court Act. I am of opinion that decision is a conclusive authority against the plaintiffs.

I desire to add that a good deal of discussion was had at the trial, mainly at my instigation, as to whether any remedy existed at law or in equity, by which either the Judicial Commissioner, or a Judge sitting as an equity Judge, could raise out of the personal estate any sum to supplement the deficiency between the purchase-money of the land and the redemption price. In the end it was as much insisted upon by the plaintiffs as by the defendants, that there was no such remedy. The plaintiffs relied indeed on this as an argument. If the Common Law could not give them redress, there was a wrong without a remedy. The covenant, they say, must be presumed to continue until the rent be redeemed. But the Common Law has its limitations. It cannot read a section into an Act of Parliament, and there is no section to that effect. It is clear that the right to rent was changed into a claim against the purchase-money at the date of the vesting order, and that by the vesting order the relation of lessor and lessee was destroyed. A disembodied covenant is not known to the Common Law. It cannot live after the grant in which it had its being has ceased to live. A section that it might be deemed to be alive till redeemed would not have been out of place in a Land Act. But I cannot supply the omission.

A further defence was raised, that it becomes unnecessary for me to discuss at any length. The defendants have fully administered the estate of the deceased grantee, and of Mr. Cecil Roche, who took as first tenant for life under his will. Evidence has been given of the service of notices, and I am asked to decide that the notices given by them were sufficient under 22 & 23 Vict. c. 35, s. 29. I give no decision upon this. It is not necessary. I have preserved the evidence, and it will be available for the defendants, in the future proceedings (1).

I must give judgment for the defendant with costs.

(1) The question as to the sufficiency of these notices was subsequently, on the 29th November, 1912, argued in the King's Bench Division, and the Court, consisting of Palles, C.B., and Gibson and Kenny, JJ., held that they were insufficient.—REP.

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The present application was on behalf of the plaintiffs for an order that the judgment of Dodd, J., should be set aside, and that judgment should be entered for the plaintiffs; and, in the alternative, for a new trial.

S. L. Brown, K.C. (with him, *Conner, K.C.*, and *Farran*), for the plaintiffs:—

We do not rely on the alternative claim for £700 put forward in the amended statement of claim. We contend that the plaintiff, W. M. Colles, is entitled to judgment for the sum of £75, which he claims, not as rent issuing out of the lands, but on the continuing obligation to pay this yearly sum of £150 created by the covenant in the lease of the 3rd August, 1866; a sum in the nature of rent issuing out of the statutory estate created in a sum of money which now represents the land. This obligation, we submit, continues until the redemption price has been paid in full. Until then the remedy on the personal covenant remains unaffected. When the Land Commission make a vesting order under section 16 of the Irish Land Act, 1903, this vests the lands in them in fee-simple, discharged from all claims in respect of superior interests, and such claims cease as against the land and attach to the purchase-money in the like manner as immediately before the order they attached to the land. This discharges the claim for the rent only so far as payable out of the land, something else being substituted for the land, namely, the purchase-money, against which the claim attaches *in like manner* as it had attached to the land; that must be as a claim for an annual sum in the nature of rent. The effect of a vesting order is that the claim for the rent is transferred from the land to the purchase-money, but this transfer in no way alters the character of the claim transferred: *In re Close's Estate* (1), *per* Walker, L.J., p. 390. The rent must be deemed to exist after the vesting order, otherwise how could it be redeemed? Section 31 of the Land Law (Ireland) Act, 1896, provides that where any land is sold under the Land Purchase Acts, the sale is to be made discharged from all superior interests, and the land vested in the purchaser in fee-

(1) [1905] 1 I. R. 371.

simple; and such superior interests or their value are to become a lien upon, and be redeemed or satisfied out of, the purchase-money. But there is nothing to deprive the owner of his right to enforce collateral securities. Mortgages are also transferred to the purchase-money. Could it be contended that the effect is to deprive the mortgagee of his right to sue the mortgagor on the covenant for payment? In fixing the redemption price of a rent it is the practice of the Land Commission Court to take into consideration the personal covenant by the original grantee to pay, if of appreciable value: *In re Stronge's Estate* (1). The figures show that Wylie, J., took the value of the covenant into consideration in the present case, since he fixed the redemption price at £3000, although the value of the lands had a few days before been determined to be only £2300. In *In re Borrowes' Estate* (2), Cherry, L.J., expresses the opinion (p. 236) that the owner of a head rent cannot be deprived of his remedy upon the covenant in the lease unless he is paid the full amount of the redemption price. Suppose the rent is not redeemed until several years after the vesting order, is the owner of it to get nothing in the meantime? The claims which attach to the purchase-money are claims which previously had attached to the land, as distinct from claims *in personam*. The policy of the Land Purchase code is to vest the land in the purchaser in fee-simple, free from all claims in the nature of superior interests, but, except so far as necessary for this purpose, not to interfere with the rights of the owner of such interests. [He also referred to the Purchase of Land (Ireland) Act, 1885, s. 9; Irish Land Act, 1903, s. 24, sub-sections 1, 5, 6: *In re Borrowes' Estate*, No. 2 (3).]

Ronan, K.C., and *Jellett, K.C.* (with them *Newett*), for the defendants:—

In *In re Close's Estate* (4), Walker, L.J., was not dealing with a question like the present, but with the principle on which a head-rent was to be redeemed. In the same case Palles, C.B., dealing with a claim for head-rent transferred to the purchaser

(1) [1906] 1 I. R. 550.
(2) [1911] 1 I. R. 218. At p. 219 "80" was erroneously printed for "50" as the acreage.
(3) [1912] 1 I. R. 97.
(4) [1905] 1 I. R. 371.

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money by an order made under section 23 of the Act of 1903, states that the subject-matter of the claim "was, in my opinion, not at the time a subsisting rent payable *de anno in annum*, but was the capital sum constituting the redemption price of that rent. The power to redeem vested in the Land Commission ripened, at latest at the moment of the sale, into an obligation to redeem; and the right of the owners of the 'superior interest' at that moment changed from their previous right to an annual rent to a right to a capital sum." No exception was taken to that statement by any of the other Judges in the Court of Appeal.

The plaintiff, William Morris Colles, sues as devisee, under the will of the Rev. W. M. Colles. He was therefore a landlord by assignment within the meaning of section 14 of the Landlord and Tenant (Ireland) Act, 1860, and only entitled to claim for rent which accrued due, or breaches of covenant which occurred, while he continued to be such landlord. A vesting order has the same effect as a Land Judge's Conveyance: Purchase of Land (Ireland) Act, 1885, section 8. The order of the 17th February 1909, therefore, transferred all the estate of the plaintiff, W. M. Colles, to the Land Commission, and as from the date of that order he ceased to be landlord: *Rawson* v. *Grogan* (1),

The plaintiff, to establish his claim, must rely either on the lease of 1866 or some provision in the Land Purchase Code. His rights under the lease are clearly at an end; there is no landlord, no tenant, and no rent. The covenant is to pay the rent during the estate thereby granted, and that estate has come to an end. The covenant is a superior interest: Land Law (Ireland) Act, 1896, section 31, sub-section 8. Its value has been ascertained, and is included in the redemption price. The plaintiff's claims under the lease are therefore gone, and any remedy he has must be found in some of the statutes constituting the Land Purchase code. To enable him to sue in the present action, it would be necessary that there should be a section to the following effect:— "Unless and until the full amount of the redemption price is satisfied out of the purchase-money, or otherwise, the rent is to be deemed to continue." There is no such provision in any of the

(1) I. R. 3 C. L. 631.

Acts; on the contrary, the result of the legislation is that there is one source and one source only to which the owner of a superior interest can look, and that is the purchase-money. In the case of an Act of Parliament which creates a new jurisdiction, a new tribunal, new forms, or new remedies, the procedure, forms, or remedies there prescribed, and no others, must be followed, until altered by subsequent legislation: Craies on Statutes, p. 331; *The Queen* v. *County Court Judge of Essex* (1), per Lopes, L.J. In *Burchall* v. *Coyle* (2), Palles, C.B., held that the effect of section 31, sub-section 1, of the Land Law (Ireland) Act, 1896, was to provide a fund to satisfy the charge, and wholly to extinguish the personal liability. That, no doubt, was merely a circuit decision on the hearing of a civil-bill appeal, but it was adopted by Meredith, J., in *In re Crosbie's Estate* (3). With respect to the *dictum* relied on of Cherry, L.J., in *In re Borrowes' Estate* (4), it is clear that he had formed no concluded opinion on the point, as is shown by his statement:—"What is to happen in the unfortunate event of the funds proving insufficient, I am not now prepared to say." As to the inexpediency of deciding a case upon the authority of dicta of modern judges, see the observations of Kay, J., in *Dashwood* v. *Magniac* (5). The case of a mortgage is quite different from the case of landlord and tenant. It may seem a hardship to the plaintiff that all his remedies in respect of the rent should be extinguished without the redemption price being paid in full; but on the other hand there would be hardship in holding the personal representatives of the original lessee liable for a result brought about by a subsequent owner of the land. [They also referred to:—*Boot* v. *Wilson* (6); *Wadham* v. *Marlowe* (7); *In re Irvine's Estate* (8); *In re Ryan's Estate* (9).]

Conner, K.C., in reply referred to *De Vesci* v. *O'Connell* (10).

(1) 18 Q. B. D. 704, at p. 708.
(2) 37 I. L. T. R. 176.
(3) [1907] 1 I. R. 116, at pp. 121, 122.
(4) [1911] 1 I. R. 218.
(5) [1891] 3 Ch. 306.
(6) 8 East, 311.
(7) 4 Dougl. 54.
(8) [1903] 1 I. R. 41.
(9) [1908] 1 I. R. 467.
(10) [1908] A. C. 298.

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Nov. 27.

GIBSON, J.:—

The question for decision is, whether on a sale effected under section 3 of the Act of 1903 of portion of a demesne, the then owner of a superior interest can sue the executors of the original grantee in covenant, if the sale price proves insufficient to redeem such superior interest. In valuing a superior interest for redemption, the Land Commission considers the security, and, where the margin is narrow, reckons the value of the covenants as forming portion of the security; and the redemption-price is assessed accordingly. In the reported cases, where this course has been followed, the redemption-price on this composite basis has not exceeded the value of the fee-simple. I doubt if Parliament contemplated or has dealt with the contingency of the fee being less valuable than the superior interest, or contemplated the valuation of covenants over and above the value of the fee-simple. It apparently assumed that the purchase-money would be, or ought to be, enough to satisfy the redemption-price. Land purchase was regarded as a matter of public policy, in the interest of the greatest number; and cases of rare individual hardship may have been overlooked or disregarded, or left to the controlling discretion of the Land Commission. In the present case the redemption-price is £3000, while the value of the fee is £2,300, the difference, £700, representing, I assume, value of covenant as personal security for the rent. Expropriation by vesting order precedes, and is independent of, redemption; and the intention of the Legislature was apparently confined to providing for redemption out of proceeds of the sale. Redemption is circumscribed within Land Purchase proper, and personal remedies outside are not provided for in express terms, or possibly at all. Such personal remedy valued conjecturally might in event be found of no value in fact, in which case redemption in full could never take place where (as here) the sale funds fell short.

The best protection against the danger of a possible deficit would obviously be prevention, the Land Commission refusing to purchase in the interest of the vendor-owner without securing the redemption rights of the superior owner. The Court of Appeal in *Borrowes' Estate* (1) pointed out that risk of insufficiency was a matter which

(1) [1911] 1 I. R. 218.

might influence the discretion of the Land Commission in proceeding under section 3. In the present case the Land Commission overruled Mr. Colles' objection, and the fee-simple is now admittedly discharged from all claims "in respect of" the superior interest, such claims becoming attached to the purchase-money in like manner as immediately before the vesting order they attached to the land: section 16.

The present action is against the executors of the original grantee, now many years dead. Whether some other form of relief might not be competent I need not consider. There may be none. As a matter of abstract justice, it would seem *à priori* more reasonable that the vendor-owner should be liable rather than the executors. The deficiency results from the vendor-owner's act, done for his own advantage under the provisions of a statute long subsequent to the grant, and should more equitably be borne by him than by personalty in which other persons may be interested. Such personalty might be non-existent, having been administered long ago, and having disappeared, thus offering no security at all. The value of the covenant for redemption purposes would be probably influenced more by the present financial ability of the vendor-owner, of which the Land Commission could take cognizance, than by guess or conjecture as to remote personalty, as to which information would hardly be available. In the present case there is a plea of *plene administravit*, and if I was to speculate, I should suppose that the £700 represented the value of the vendor-owner's descended covenant, and not the value of the personal covenant in the original grant.

I shall deal with the case first in its real property aspect, and then from the statutory standpoint.

According to ordinary real property law, the extinction of the original granted estate makes recovery of subsequent rent under covenant impossible. The covenant disappears with the estate to which it was attached. A covenant severed from the estate—cut off from any legal base, and in the air—a disembodied covenant—is inconceivable, and would differ in its essence from the actual covenant in the grant. The covenant to pay rent cannot be transformed *cy-près* into a covenant to pay, not rent, but a personal annuity of the same amount.

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The plaintiff's sole remedy must be discovered in the Purchase Code, in which "redemption" clearly means actual payment. The redemption order fixing the price is a condition of redemption, but is manifestly not redemption itself.

The argument for the plaintiff was based, not on the view that the superior interest was notionally, by statutory implication or fiction, deemed to subsist till redemption, as between the original owners, but on the proposition that, though the superior interest was for all purposes gone, the covenant, as a kind of personal or collateral security, survived the wreck, and, cut off from the land, still was alive and in force to affect the original grantee's personal estate. Such fancy covenant is not the covenant in the grant for payment of rent. That covenant cannot be split in two and made a covenant to pay rent and another covenant to pay a sum equivalent to rent, but not issuing out of land. The proposed invented new covenant can by no possible implication be extracted from the statutes.

The only plausible way of presenting the plaintiff's case would be that, until redemption, the superior interest—no longer affecting the land sold—is deemed to subsist as against the vendor-owner and others liable in respect of the original estate.

The difficulties confronting this view are formidable. If the estate, discharged and extinguished in fact, is to be deemed by a kind of fiction to survive as a real-estate entity, it would descend and bind the heir in respect of rent of an imaginary estate of which he would never be seised.

Can the rent-owner, till actual redemption, sue for rent in respect of this implied or fictitious estate? Or is his right suspended till redemption is found to be impossible? It would seem to me that if the vendor-owner and his heirs are not bound by this artificially preserved covenant, the original covenantor and his personal assets equally cannot be bound. If the fiction of continuance at all is admissible, should it not be confined to the vendor-owner, whose act, done for his own gain, makes redemption necessary? Why should such continuance be implied so as to affect executors of the grantee? The most obvious and substantial mark for covenants to be enforced in respect of the implied estate would be the vendor-owner, not remote personalty of little value, possibly no value at all.

The Legislature might have inserted a declaration that until redemption was effected the superior interest, with all rights thereto attached, was to be deemed to subsist (1) against the grantee, his heirs, executors, &c.; (2) against the vendor-owner, his heirs, &c.; (3) against the vendor-owner personally. It has not seen fit to do so. The only protection given against deficiency of funds to effect redemption is the discretion of the Land Commission; the only direct remedy is against the purchase-money. If implication or fiction is to be resorted to, such fiction ought, I think, to be limited, so as to affect the vendor-owner only, and not to supply a deficit, occasioned by his sale and purchase, by imposing the loss on other persons in no way responsible for or identified with the sale, and deriving no benefit therefrom.

To the objection that the executors ought not to be called on to make good the £700 under the covenant or otherwise, it is no answer to say that, if obliged to pay, they may claim recoupment from the vendor-owner. The action and argument are on the footing that the vendor-owner is *not* liable—he is not party to the action. I doubt if such relief could be given. If he is liable, why is he not sued? Why impose on the executors the risk of an action for money paid against a person who, not in this but in a possible case, might be of doubtful solvency?

I cannot discover in the code any implication which throws on the executors of the original grantee liability for the insufficiency of the redemption fund.

No aid can be got from minute analysis of the language of the various statutes. The solution of the problem depends on a few simple outstanding considerations:—(1) the vesting order, if made, admittedly at once discharges the land from all claims in respect of the superior interest, though such interest is not to be, and cannot be, redeemed till subsequently; (2) the redemption price is ascertained after such vesting order; (3) the redemption price is assumed to be paid in full; (4) such price is charged on the proceeds of sale, the contingency of deficiency being left uncovered. The assumption that payment in full would be made might be falsified in result, as the assets conjecturally estimated, on plaintiff's view, as the basis for valuing the covenant might turn out to be non-existent, so that the

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full redemption price could not be realized. The omission to provide for this may be because the superior interest remedy is confined exclusively to such proceeds, the superior interest not being allowed, for reasons of policy, to exceed the value of the fee; otherwise the vendor would be discouraged from selling. Or possibly the matter may be *casus omissus*. The plaintiff contends that neither of these explanations should be accepted, and that the apparent *hiatus* in the express legislation should be filled by implication. Can this be done? and what is the implication to be? Implication of a pure personal covenant (as argued) continued notwithstanding the complete cesser of the estate? or implication of continuance of that estate *inter partes*? No authority on the construction of statutes justifying any such implication has been cited. Where an estate with its attached covenants is expressly extinguished, it is difficult without clear language to infer its metaphysical continuance for special limited purposes in order to avoid what Judges may deem a hardship, but what Parliament may have intentionally disregarded or accidentally may have overlooked. The principle that expropriation without compensation requires explicit language has small application here, where there is an ear-marked limited compensation fund, and complete and final expropriation precedes redemption. There is no Irish decision on this point. *M'Farlane* v. *Booth* (1) decided that a sub-tenant on the occasion of a sale under sections 15 and 16 of the Act of 1903 was discharged from liability for arrears of rent, a personal accrued debt, due to his immediate landlord, such arrears constituting part of the intervening interest which was to be valued and paid for out of the purchase-money—that is, that pending redemption there was no right of action, which would involve that there was no constructive continuance of the intervening interest, which is put in the position of a superior interest. To this extent the authority is in point, though it does not relate to proved insufficiency of the redemption fund. In practice I believe rent is always paid, notwithstanding vesting, until redemption is complete. In *In re Borrowes' Estate* (2) (where the Lord Chancellor and Holmes, L.J., referred to the matter

(1) [1910] 2 I. R. 12.

(2) [1911] 1 I. R. 218.

as one which might affect the discretion of the Land Commission), there is an important *dictum* of Cherry, L.J., entitled to peculiar respect from his exceptional familiarity with this branch of law, that the owner of the head-rent cannot be deprived of his remedy under the covenant, unless he is paid the redemption price in full. He expressed, however, no concluded opinion on the point, which could not properly have been considered by the Court in the absence of the parties affected. His attention was not, apparently, directed to the difficulties I have discussed: how a covenant, dead in respect of an extinguished estate, could be called back into new life in the shape of a wholly different personal covenant, divorced from land, to pay an annual sum in lieu of the extinguished rent; how a covenant, no longer affecting the actual estate, could be deemed to operate against a supposititious estate depending on fiction or implication; how, and against whom, such implied estate was brought into being; how it would descend; how and when the rent could be sued for in respect of such fictitious estate during its supposed continuance; and how a covenant attached to the implied estate coming into being by reason of the extinction of the actual estate could extend to a remote ancestor in no way responsible for the act giving rise to the extinction of the actual estate and the creation for limited purposes of the implied estate in its place. These difficulties I find insuperable. By no process of judicial alchemy can the plaintiff's covenant be preserved so as to support the present action. I am of opinion that the judgment of my brother Dodd should be affirmed. If this action had been against the vendor-owner, who in fairness might be called on to make good the deficiency, I might have expressed regret at the result; but the action being against executors of the original grantee, the hardship of imposing the loss on the plaintiffs, or on such executors, appears nearly equal.

PALLES, C.B.:—

I regret that I am unable to agree in the judgment just delivered by Mr. Justice Gibson. I am of opinion that the plaintiff, William Morris Colles, is entitled to recover the half-year's rent sued for; and in that opinion my colleague, Mr. Justice Boyd,

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who heard the argument, but who is unable to be present, owing to being engaged in another Court, agrees.

The question for decision is, whether a covenant to pay rent contained in a lease, which constitutes a "superior interest," within the meaning of our Land Purchase Code, continues to subsist during the period between the order vesting the estate in the sub-tenant under the provisions of that code, and the actual payment of the ascertained value of the superior interest.

The covenant in question is contained in a deed of the 3rd August, 1866, whereby the Rev. William Morris Colles demised to Robert Higginson Borrowes and his heirs part of the lands of Grangemore, containing 49A. 2R. 28P. in the county of Kildare, for ever, subject to the yearly rent of £150, payable half-yearly on the 1st May and the 1st November.

The covenant, which is in the usual form, is by Robert Higginson Borrowes, for himself, his heirs, executors, administrators, and assigns, with William Morris Colles, his heirs, and assigns, that he, Borrowes, his heirs and assigns, shall and will, at all times thereafter during the estate thereby granted, pay or cause to be paid to the said William Morris Colles, his heirs and assigns, the said yearly rent of £150, by two equal payments on every first day of May and first day of November, free of all rates, taxes, and impositions.

Although, at common law, this deed would not amount to a lease, by reason of no reversion being left in the grantor, there can be no doubt that it created the relation of landlord and tenant between the parties, within the meaning of our Landlord and Tenant Act, 1860, section 3 (23 & 24 Vict. c. 154); and consequently constituted a lease.

The estate of the lessor is now vested in William Morris Colles, one of the plaintiffs; and the defendants are the personal representatives of Robert Higginson Borrowes, the lessee.

The action is brought to recover £75, being a half-yearly gale of rent which accrued due on the 1st November, 1911, a time at which the lessor's estate would have been vested in the plaintiff, William Morris Colles, had the vesting order not been made.

The lands demised by the lease were, after the making of the lease, taken into, and incorporated with, the Borrowes demesne in

the county of Kildare; and this demesne afterwards became vested in Sir Kildare Borrowes.

The Irish Land Act, 1903, by section 3, sub-section 1, empowers the Land Commission, under certain circumstances which we must assume existed here, to purchase from the owner of an estate his demesne, at the price which, in their opinion, represents its selling value, and in such case to re-sell the whole or any portion of that land.

On the 25th June, 1909, Sir Kildare Borrowes undertook with the Estates Commissioners that, in case the Land Commission bought from him the lands of Grangemore and Gilltown, which include the lands demised by the lease, for £19,022, he would re-purchase the same from them for the said sum of £19,022, and would apply to the Land Commission for an advance of £15,218, for the purpose of that purchase, to be repaid by an annuity as provided by the Act of 1903; upon the 29th of the same month, the Land Commission agreed to purchase from Sir Kildare Borrowes those lands in fee-simple, subject as provided by that Act, for the sum of £19,022; and upon the 17th February, 1910, it was ordered by the Land Commission that the said lands (with certain exceptions not material to be mentioned) should vest in, and the same were thereby vested in, the said Land Commission. By a further order the same were conveyed to and vested in Sir Kildare Borrowes in fee-simple, subject to and charged with the repayment to the Commission of the advance of £15,218 and interest, as provided by the Land Purchase Acts, and, subject also to the conditions and clauses contained in the undertaking, and to such other charges only as might lawfully affect the lands, to the uses to which they would then stand limited if an order had been made vesting the same in Sir Kildare Borrowes on the 29th June, 1909—the date of the order granting the advance.

The conditions and clauses contained in the undertaking did not include—and indeed under the Acts could not have included—payment of the rent of £150, so that the lands vested in Sir Kildare Borrowes were not subject to that rent. The purchase-money of £19,022 was afterwards apportioned between the lands demised by the lease and the other lands included in the agreement with

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the Land Commission of the 29th June, 1909; and the portion of that purchase-money which, in the opinion of the Land Commission, represented the selling value of the fee-simple of the demised land was ascertained at the sum of £2300.

The rent reserved by the lease of the 3rd August, 1866, was a "superior interest," as defined by the Land Law (Ireland) Act, 1896, section 31, sub-section 7 (59 & 60 Vict. c. 47); and the first sub-section of that section rendered it necessary that, in a case such as the present, the sale should be made discharged of all superior interests, and consequently of it; and the sub-section enacted that "such superior interest, or the value thereof, shall become a lien upon, and be redeemed or satisfied out of, the purchase-money of such land."

The value of this superior interest was ascertained by the Land Commission at the sum of £3000, being £700 more than that which, in their opinion, represented the selling value of the fee-simple. It consequently was insufficient to redeem the superior interest. That superior interest accordingly has not been redeemed; nor has the £2300, or any part of it, been allocated to or received by the plaintiff.

The present action is brought, as I have already stated, to recover a half-yearly gale of the rent which the plaintiff, William Morris Colles, would undoubtedly have been entitled to recover but for the vesting order of the 17th February, 1910; and the question for our decision is, has the vesting order deprived him of his right to recover it? This depends upon the true construction of the 16th section of the Act of 1903 (3 Edw. 7, c. 27) and the 31st section of the Act of 1896 (59 & 60 Vict. c. 47).

The 16th section of the Act of 1903 enacts that the Land Commission may, where they agree to purchase any land, make a vesting order which shall be effectual to vest in the Commission the fee-simple of the lands purchased, subject to certain rights and charges, which do not include such a rent as that reserved by the lease of 1866. The section then proceeds—"But, save as aforesaid, and subject to the provisions of this Act with respect to minerals, discharged from the claims of all persons who are interested in the lands, whether in respect of superior or intervening interests or incumbrances or otherwise, and all such claims

shall, as from the date of the vesting order, cease *as against the lands* and *attach to the purchase-money in like manner as* immediately *before* the date of *the order* they *attached to the lands*."

It seems clear that, under these words, the land in the hands of Sir Kildare Borrowes is not now subject to the rent of £150 a year. The claim of William Morris Colles, who was interested in the land, in respect of the superior interest, ceased *as against the land*, but attached to the £2300 purchase-money, in like manner as it had, immediately before the date of the order, attached to the land. That claim was one to a rent issuing out of the land, and secured by, *inter alia*, the personal covenant of the lessee. In my opinion it continued, after the vesting order, to attach to the purchase-money, as a rent secured by a covenant; and it must continue to be so attached and so secured until the claim of Mr. Colles is extinguished; and thus the question appears to me to be: Has that claim been extinguished? This depends, not upon the Act of 1903, which leaves the claim a subsisting one as against the purchase-money, but upon the earlier Act of 1896, which requires the superior interest to be purchased and redeemed.

The 31st section of the Act of 1896 applies to lands sold under various circumstances; and amongst others to cases "where a lessor or grantor has signified his consent to the redemption of a rent, under the Redemption of Rent (Ireland) Act, 1891"; and it directs that "in every such case . . . such superior interests or the value thereof shall become a lien upon and be satisfied out of the purchase-money of such land."

The first section of the "Redemption of Rent (Ireland) Act, 1891," thus referred to, provides that in certain cases a person in *bona fide* occupation of a holding at a rent shall, subject as therein mentioned, be entitled to apply in the prescribed manner to redeem his rent, whereupon, if the lessor or grantor, as the case may be, signifies his consent, then such redemption *shall be effected by payment*, subject to the Rules of the Land Commission, of such capital sum as may be agreed upon, or as in case of difference may be determined by the Land Commission, in like manner as if it were a head rent redeemed under the provisions of section 16 of the Land Law (Ireland) Act, 1887.

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This section, and those of the Act of 1887 thus referred to, in my opinion, show expressly, that which indeed would have been otherwise apparent, that the word "redemption" in section 31 (1) of the Act of 1896 means "redemption effected by payment."

It is now said that the effect of the order is to extinguish the personal covenant for payment contained in the grant; and this on two grounds—(1) Because the covenant is to pay the "rent," and it is said that the effect of the vesting order is to deprive the rent of its essential character as "rent"—that the thing covenanted to be paid has ceased to exist; and (2) because the operation of the covenant is limited by the words "during the estate hereby granted," and that that estate has been determined by the vesting order.

These arguments have found acceptance with my brother Gibson; and, being aware of his view, I have given to them, as I was bound to do, all the consideration of which I am capable; but instead of being able to agree in the opinion he has formed, I regret to say that I have arrived at the contrary conclusion—a conclusion which, but for the doubt which is necessarily incident to its being antagonistic to that of my learned brother, would have been a clear one.

I am of opinion that, upon the true construction of the Act of 1903, and of the other Acts constituting the Land Purchase Code, where, as here, immediately before the making of a vesting order under section 16 of the Act of 1903, the lands thereby vested in fee in the Land Commission are held under a fee-farm grant reserving a rent, which grant contains a covenant for its payment, and constitutes a "superior interest," within the meaning of the 59 & 60 Vict. c. 47, section 31, sub-section 8, the effect of the words of the 16th section which limit the cesser (effected by the order) of claims in respect of the superior interest, by the words "*as against the land*," and which attach those claims to the *purchase-money*, "*in like manner* as they had" previously "attached to the land," is that until redemption of the superior interest under the provisions of the code that superior interest is, as regards all persons except the Land Commission and those claiming through it, *to be deemed to continue*, and the rent is to be deemed to continue *as a rent*; and, consequently, that the covenant continues to subsist as if the rent had not ceased *as against the land*.

My reasons for this conclusion are divisible into two classes :—

First, those referable to the intention to be gathered from the Act of 1903, taken as part of the Land Purchase Code.

Secondly, those referable to the words which, as I read them, are carefully chosen to effect that intention.

As to the first, the primary intention of the Act was to vest in the Land Commission the fee-simple of the land comprised in the vesting order, in order that that fee-simple might ultimately be vested in the purchasers.

But the mode in which that intention was to be effectuated was not by expropriating the owner of a "superior interest" without payment. The Act incorporated the previous Acts of the Land Purchase Code—a code which provided for selling the lands discharged from a "superior interest," on the terms of such superior interest being redeemed by payment of its value, ascertained in a mode prescribed by the code.

Mr. Justice Gibson agrees that the redemption under this code does not take effect until the full value ascertained in the prescribed manner has been paid to the owner of the superior interest. It was, therefore, as much part of the intention of the Act of 1903 that the superior interest should not cease until its ascertained value should have been actually paid to its owner, as it was that the fee-simple of the land (which included such superior interest) should be conveyed to a purchaser. The provisions of section 24, however, show that actual payment of the price could not take place until after the land had been vested in the Land Commission, which involved that the "superior interest" was extinguished as against the land. This shows that the second intention should yield to the first, so far as was necessary to enable the land to vest in the purchaser in fee-simple ; but it does not, nor does any other part of the Act, show any intention that this second intention should yield to the first *to any greater extent* ; that is to say, there is no intention that, notwithstanding the passing of the fee-simple, the "superior interest" should not, until redemption by payment, be deemed, as against all persons other than the purchasers, to continue to be vested in the owner.

It may be that the Legislature had not in its actual contemplation a case of the Estates Commissioners exercising their power

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under section 3, sub-section 1, of selling a demesne to its owner, when part of it was held at a rent exceeding its value, and in which consequently they should fix the value of the fee-simple at a sum less than that of the "superior interest" which was part only of that fee-simple; but having regard to the decisions prior to the Act, which must be taken to have been within the knowledge of the Legislature, and in reference to which they must be deemed to have legislated, such a state of facts was possible, as the price to which the Land Commission was limited by section 3 was that which, in their opinion, represented the selling value; and section 31, sub-section 8, of the Act of 1896 included in the "superior interest" the covenants contained in the instrument under which the land was held. Hence, in every case in which a demesne, or part of it, was held at a rent exceeding its real value, its purchase-money might be insufficient to pay the ascertained value of the "superior interest"; and as, whether the Legislature had or had not this possibility in contemplation, they did not exclude the jurisdiction of the Land Commission from purchasing in such a case, it seems impossible to say that, by transferring the claim in respect of the "superior interest" from land to its purchase-money, it could have contemplated that, in all cases, the purchase-money must necessarily be sufficient to pay the ascertained value of the "superior interest"; and, therefore, unless the Act preserved against third parties until payment such rights as the owner of the superior interest had against them, those rights might be extinguished under the Act without compensation, even where there was no necessity to do so for effectuating the primary intention of the Act, as whether in such a case the Land Commission should sell was left to its discretion.

I now come to the words of section 16. They appear to me to do no more, in respect of the "superior interest," than to substitute the "purchase-money" for "the land," and to leave unaffected any remedy the owner of that interest had for his rent, other than remedies against the land. It provides that all claims in respect of the superior interest shall cease as against the lands, but all those claims are attached to the purchase-money "in like manner as immediately before the date of the order they attached to the lands." What was the claim of Mr. Colles that attached to the purchase-money? It was emphatically a claim to a "rent,"

not to an annual sum which was not rent—a claim to a rent, as it existed not after the order, but as it was "immediately before the order"—a claim to a rent issuing out of land—not to an annual sum charged on the purchase-money. This was the *ratio decidendi* of every member of the Court of Appeal in *Close's Estate* (1). This was the claim that was transferred to the purchase-money, and therefore one which Mr. Justice Gibson agrees with me continued to exist until it was extinguished by redemption.

Now, how can a claim to a "rent," payable during the continuance of an estate which had ceased to exist, attach to purchase-money, otherwise than by holding that, for that purpose, it must be *deemed to continue*, and the estate out of which it is payable must also be deemed to continue? As this assumption, were it made as against the purchaser, would defeat the primary intention of the Act, it cannot be made against him. I consequently refuse to make it against him, but as against all other parties I do make it, especially as between the parties to pay and to be paid the rent. Is there anything in the *words* of the Act against this implication thus limited? No; for the cesser is, by section 16, expressly limited by the words, "as against the lands." Is there anything in the intention of the Act gathered from its policy? No; for not only is it consistent with the fee-simple passing to the purchaser, but it is also consistent with the terms on which it was intended that that fee-simple should be acquired, viz., on payment of the purchase price.

In other words, I find by necessary implication—or indeed I may say in very words in the Act—the provision which Mr. Ronan and my brother Dodd think ought to have been in it to enable the plaintiff to recover in this action.

Mr. Justice Gibson is of opinion that difficulty arises as to the descendible character of the "superior interest" between vesting order and redemption; and uses this as an argument against my view. I cannot see any such difficulty. In my opinion, it descends as realty until redemption; *i.e.*, until the making of the order to pay to the owner of the superior interest the purchase-price, or to lodge it to his separate credit. Upon the making of this order it is converted into personalty.

(1) [1905] I R. 371.

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I am, therefore, of opinion that, as the value of the rent of £150 a year has not as yet been paid, that rent has not as yet been redeemed, and that it still continues to exist, as between the plaintiff and the defendants here; and that consequently the plaintiff is entitled to recover.

Much reliance has been placed on passages in my judgment in *Close's Estate* (1), which it is said were to the contrary effect. In speaking of a rent constituting a superior interest, I said that the subject-matter of the appellant's claim was, in my opinion, not at that time a subsisting rent payable *de anno in annum*; that the power to redeem vested in the Land Commission ripened, at latest, at the moment of the sale; and that the right of the owner of the superior interest had changed, from the previous right to an annual rent, to the right to a capital sum—the capital value of the rent. I am still of that opinion; and I can see no inconsistency between that statement and this judgment.

In *Close's Estate* (1) the question in controversy was as to the mode of valuation. It assumed, as indeed the figures there showed, that there was there sufficient money to redeem. I held that the thing to be valued was the rent which existed immediately before the vesting of the estate in the purchaser—a rent charged on land in Ireland, subject to the fluctuations in amount incident to land in Ireland, and to the clauses as to variation which existed under the statutes relating to Trinity College; and that it was not to be valued as a rent invariable in amount, charged on a sufficient sum of Government Stock. In the present case, the matter involved is not the mode of valuation, but the right of the owner of the superior interest before redemption. The redemption will be effected by the payment of a capital sum for the ascertainment of which future redemption must be assumed; but, until redemption, the right of the plaintiff is not to a capital sum, but to an annual sum, an annual *quasi* rent.

In my opinion, the verdict for the defendants ought to be changed into one for the plaintiff, William Morris Colles, with costs, including the costs of the motion.

Solicitor for the plaintiffs: *C. H. Monsarrat.*

Solicitor for the defendants: *John Pride.* J. G. T.

(1) [1905] 1 I. R. 371, at p. 382.

THE KING (RYAN) *v.* THE RECORDER OF CORK (1).

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1911.
Oct. 26, 30.
Appeal.
Dec. 15.

Local Government—Labourers Acts—Improvement scheme—Cottage—Order of County Court—Judicial act—Undertaking not to let cottage to objectionable tenant—Illegality—Prohibition—Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37), section 6, sub-s. 4 (c).

An order of the County Court under section 6, sub-sect. 4 (*c*), of the Labourers (Ireland) Act, 1906, confirming, amending, or disallowing an order of a Local Government Board Inspector confirming an improvement scheme, is a judicial act, and is the subject of prohibition.

R. (*Eustace*) v. *Local Government Board* (44 I. L. T. R. 176) distinguished.

An order of a Local Government Board Inspector, confirming an improvement scheme under the Labourers (Ireland) Acts, provided for the taking of a site on lands in the occupation of M. for a cottage to be built for R., on whose behalf a representation under the Acts had been made. M. presented a petition to the County Court against this provision, on which an order was made confirming the order of the Inspector, and proceeding:—"The respondents" (the Rural District Council) "undertaking not to put into occupation of the cottage any labourer reasonably objectionable to the petitioner, and to consult the petitioner as to the selection of the tenant." The site was then acquired by the Rural District Council, and a cottage built upon it which was let to a tenant, not R. On an application by R. for a writ of prohibition to prohibit proceeding on the undertaking in the order of the County Court:

Held, that the undertaking was illegal, but that inasmuch as it did not order anything to be done, and also on the ground of lapse of time, a writ of prohibition ought not to be granted.

PROHIBITION.

In the month of January, 1907, a representation under the Labourers (Ireland) Acts, 1883 to 1906, was made to the Kanturk Rural District Council on behalf of the prosecutor, an agricultural labourer, representing that he was living in a house unfit for human habitation, and suggesting that in lieu thereof a cottage should be built for him, and a suitable plot and garden attached,

(1) In the King's Bench Division, before PALLES, C.B., and GIBSON and BOYD, JJ.

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on a holding in the occupation of one David M'Auliffe. The representation was made on behalf of the prosecutor alone, no other agricultural labourers' names being included. This representation, with a number of others, was considered by the Council, who subsequently appointed a committee to select the plots of land to be acquired by the Council to give effect to the representation. The committee selected a site for the prosecutor on the lands of David M'Auliffe. An improvement scheme was then framed which included this site for the prosecutor. A local inquiry was held by the Local Government Board Inspector, and on the 20th December, 1907, an order was made by him confirming the improvement scheme to the extent set out in the schedule to the order, which included the acquisition of the proposed site for the prosecutor, described as site No. 511.

David M'Auliffe presented a petition to the County Court against this part of the order. The petition came on for hearing before the Recorder of Cork. The petitioner was examined, and stated that he objected to the prosecutor getting a cottage on his lands, but would have no objection to the cottage on the understanding that the prosecutor would not get it, and that he would consent to the giving of the site, provided that he was consulted in the selection of the tenant. The Recorder made an order confirming the order of the Local Government Board Inspector, so far as related to site 511, and the order proceeded:—"The petitioner consenting to the alternative site, No. 511A, and the respondents" [the Kanturk Rural District Council] "further undertaking not to put into occupation of the cottage any labourer reasonably objectionable to the petitioner, and to consult the petitioner as to the selection of the tenant or occupier. And the Court doth order that the respondents do pay to the petitioner the sum of £4 4*s.* costs of this order."

The subsequent steps necessary to acquire the site were taken by the Council, and a cottage built on it. At a meeting of the Council held on the 19th October, 1910, one Patrick Sullivan was appointed tenant of the cottage, and went into possession of it.

The prosecutor now applied, on notice served by leave of the Court, for a writ of prohibition directed to the Recorder of Cork,

the Kanturk Rural District Council, and David M'Auliffe, prohibiting them, or any of them, from further proceeding under the portion of the order containing the above-mentioned undertaking.

Bolton, for the prosecutor :—

The Recorder's order, which was made under section 6 (4) (*c*) of the Labourers (Ireland) Act, 1906, is a judicial act, in respect of which prohibition lies. *R.* (*Eustace*) v. *Local Government Board* (1) and *R.* (*Green*) v. *Local Government Board* (2) are distinguishable, being decisions upon clause (*a*) of the sub-section. In the former case the Court of Appeal held that the order of confirmation made by the Local Government Board under clause (*a*) was not a judicial act, because under that clause the Board did not exercise any discretion ; they were bound to make an order : see judgment of Walker, C., at p. 178, and of Holmes, L.J., at pp. 180, 181. But here the Recorder has a discretion ; he can confirm, with or without amendment, or disallow the Inspector's order, as he thinks fit, and, therefore, his order is a judicial act.

The portion of the Recorder's order in respect of which prohibition is sought was made without jurisdiction, as the Recorder's jurisdiction is limited to that conferred by clause (*c*) referred to. He had no power to give M'Auliffe a right to interfere in the selection of a tenant for the cottage, as the right to select tenants is vested solely in the District Council : section 13, Labourers (Ireland) Act, 1883, and section 29, Labourers Act, 1906. Under the latter section the prosecutor was entitled to a preference on the first letting of the cottage, but the portion of the Recorder's order objected to prevented the prosecutor getting that preference and still operates against him. Sub-section (1) of section 29 is not limited to first lettings, but applies to every letting. Therefore this portion of the order is made without jurisdiction, and this appears on the face of the order. The Court is, therefore, bound to issue a prohibition : *Farquharson* v. *Morgan* (3). In that case the Court granted the prohibition against

(1) 44 I. L. T. R. 176.
(2) 45 I. L. T. R. 65.
(3) [1894] 1 Q. B. 552.

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so much of the order as was made without jurisdiction. Prohibition lies against portion of an order: *Mackonochie* v. *Lord Penzance* (1); *South-Eastern Railway* v. *Railway Commissioners* (2). [He also cited *Mayor of London* v. *Cox* (3); *R.* v. *Local Government Board* (4); *R.* (*Wexford Co. Council*) v. *Local Government Board* (5).]

A. M. Sullivan, K.C., and *Rearden* for the District Council:—

The Recorder, in making this order, was acting ministerially merely, and not judicially, and prohibition does not, therefore, lie: *R.* (*Eustace*) v. *Local Government Board* (6); *R.* (*Green*) v. *Local Government Board* (7); *In re Local Government Board*; *Ex parte Kingstown Commissioners* (8). The order of the Local Government Board Inspector, as amended by the order of the Recorder, is final, and has the effect of an Act of Parliament: Labourers (Ireland) Act, 1906, section 6, sub-section 4 (*d*). Even assuming that an order under clause (*c*) of the sub-section is the subject of prohibition, there is nothing in the present case left to prohibit. Prohibition is a preventive remedy, and only granted to prevent the commission of a future act, not to undo an act already performed: Short and Mellor's Crown Practice, p. 252. The prosecutor, by delaying till the money had been spent and the cottage built, has disentitled himself to the writ: *Denton* v. *Marshall* (9). The granting of the writ is discretionary: *Broad* v. *Perkins* (10).

Bolton, in reply:—

It is not sought to prohibit the first portion of the order, which has been completely carried out, but only the latter portion, which is still in force. It is never too late for prohibition while any portion of an order is operating: *In re London Scottish Building Society* (11); *R.* (*Green*) v. *Local Government Board* (7). Delay

(1) 6 A. C. 424.
(2) 6 Q. B. D. 586.
(3) L. R. 2 H. L. 239.
(4) 10 Q. B. D. 317.
(5) [1902] 2 I. R. 349.
(6) 44 I. L. T. R. 176.
(7) 45 I. L. T. R. 65.
(8) 16 L. R. Ir. 150.
(9) 1 H. & C. 654.
(10) 21 Q. B. D. 533.
(11) 63 L. J. Q. B. 112.

in applying for the writ is no bar, neither is acquiescence nor laches, where absence of jurisdiction appears on the face of the order: *Worthington* v. *Jeffries* (1); *Farquharson* v. *Morgan* (2). Damage to the individual suitor is not material on an application for prohibition, as the writ lies to protect the prerogative of the Crown, and to prevent the prescribed order in the administration of justice being departed from: *Worthington* v. *Jeffries* (1); *Farquharson* v. *Morgan* (2); *R.* (*Clanricarde*) v. *Estates Commissioners* (3). The Recorder's order has not the effect of an Act of Parliament under section 6 (4) (*d*); it is the Inspector's order that has that effect when confirmed. Even if this portion of the Recorder's order was to be held an amendment of the Inspector's order, yet clause (*d*) of section 6 (4) could not protect it, as it is in direct conflict with the provisions of the Acts. Both cannot stand together; one must give way. An order made under a statute cannot over-ride the statute itself. A County Court Judge's order cannot over-ride or repeal the statutes of the realm.

Oct. 30.

PALLES, C.B.:—

This is an application for a writ of prohibition to the Recorder of Cork, to prevent him proceeding on a clause to which I shall hereafter refer, in an order made by him so far back as the year 1908. A great number of questions have been argued, upon many of which it is not necessary to give an opinion.

First, it was alleged that this was not a judicial act in respect of which prohibition would go. Mr. Bolton has satisfied me that that proposition is not sustainable, and that the decision in *Eustace's Case* (4) has no bearing on the question. That case was decided upon clause (*a*) of section 6, sub-sect. 4, of the Labourers (Ireland) Act, 1906. By that clause there was an obligation, in the circumstances, to make an order without the exercise of any judicial discretion; and the reasoning of the Court of Appeal has no application to the present case,

(1) L. R. 10 C. P. 379.
(2) [1894] 1 Q. B. 552.
(3) [1909] 2 I. R. 542.
(4) 44 I. L. T. R. 176.

K. B. Div. 1911.

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which arises upon a subsequent and different clause of the same sub-section, clause (*c*), under which it is clear that the Recorder had a judicial discretion, and was bound to exercise it. This being so, we must examine the order, and examine it as a whole.

Palles, C.B.

I do not think that I am going too far in saying that it is undoubtedly a most unusual order. It appears that there was a petition to the County Court against the part of the order of the Local Government Board Inspector in reference to a site numbered 511 on the ordnance sheet, and the order made by the learned Recorder was that the order of the Inspector should be confirmed in so far as it related to site No. 511, the petitioner consenting to the alternative site No. 511A, marked on the map, and the respondents, that is, the Rural District Council, undertaking to change the site accordingly; and the order proceeds: "and the respondents further undertaking not to put into possession of said cottage any labourer reasonably objectionable to the petitioner, and to consult the petitioner as to the selection of the tenant or occupier." I am of opinion that that undertaking is wholly illegal, as it affected the preferential right of the prosecutor under the statute, and put a fetter upon the discretion of the District Council which was not contemplated by the Act of Parliament; and, had statutable effect not been given to that order, I should have had no hesitation in deciding that the illegal undertaking, part of the price of the site, was not severable from the other parts of the order, and that the whole order was without jurisdiction, and void.

But what we have to determine is, not the effect of this order as an order simply, but its effect under the statute. The statute gives it the effect of an Act of Parliament. I have my own opinion as to what is the effect of the order, but I wish not to decide it, especially as Mr. M'Auliffe, the landlord, is not represented here. I take, therefore, the case in the alternative. Either the effect of the undertaking is to make the order mere waste paper, and deprive it of any statutable effect, in which case there is no necessity to come here for a writ of prohibition; or else, as I prefer to take it, the order was sufficient confirmation

to answer the description of an order to which statutable effect is given under the section, in which case, in my opinion, in the circumstances, although the land has passed, it is impossible that effect can be given to this illegal clause, inasmuch as it is contrary to the express provisions of the statute. In other words, when you have a contest between two documents, one a statute which authorizes a certain order to be made, and the other an order made under that statute which, not in its entirety but as regards a particular clause, is contrary to the statute, then the statute must prevail. I do not think that under this legislation an order can become effective so as to give validity to a provision in the order which is contrary to the express provision of the statute itself. Therefore my opinion is that this undertaking is not binding. This, it will be observed, is on the supposition that the land has passed under the order; but whether it has passed or not I do not decide. I deal with the matter in the alternative.

Then comes the question which is the only one we have to decide (as to which I should like to remark that although numerous affidavits have been filed, none of them has been opened before us, and our decision is simply upon the legal question), Is this a case for prohibition or not? I am of opinion that it is not. I do not think that the thing directed to be done by this order is illegal. There is no order that the respondents shall undertake to deal with the possession of this cottage in the mode mentioned. The undertaking is one matter, the order is another. If at any subsequent time an application were made to the District Council for a site, and they proceeded to act upon this clause in the order, then there would be illegality. But that illegality would not be on the part of any Court, but on the part of the District Council; and if there were a remedy for that, it would be not by prohibition, but by a proceeding for an injunction. On this short ground, that there is nothing remaining to be done under this order, nothing remaining which can be prohibited, I am of opinion that this application should be refused without costs.

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THE KING (RYAN) *v.* RECORDER OF CORK.

Gibson, J.

GIBSON, J. :—

I agree. I have no doubt that the decision in *Eustace's Case* (1) cannot be strained to cover a case where the order is in apparent and direct conflict with the principal statute. In such case the statute must prevail. An order, either of the Local Government Board or of the County Court Judge, to be treated as of statutory efficacy, must on its face appear to be under and in pursuance of the provisions of the principal statute, though it must be presumed that all preliminary conditions or standing orders have been complied with.

On the ground stated in my Lord's judgment, I think that this application should be rejected. This site has been taken in pursuance of a bargain made three years ago; a house has been erected on it; public money has been spent; and a labourer has been put in. If there was a grievance, as perhaps there was, on the part of Mr. Bolton's client, he ought to have asserted his rights in time. There is nothing now to prohibit; it is too late. He ought to have at once invoked the jurisdiction of the Court, not necessarily this Court. The Chancery Division might have restrained a breach of trust or diversion of public property from the statutory objects, assuming that the order operated so as to pass the site. If it was not a valid order, as my Lord has pointed out, there is no necessity for a prohibition. Having regard to the laches and acquiescence of the prosecutor, and the lapse of time, it is out of the question that this Court should now grant prohibition if it had jurisdiction to do so.

BOYD, J. :—

I thoroughly agree, more especially on the ground of the delay that has taken place. The order complained of was pronounced in the year 1908, and no proceedings were taken by the prosecutor to question it for three years. In the meantime public money has been expended in building a house on the site.

J. G. T.

(1) 44 I. L. T. R. 176.

The prosecutor appealed to the Court of Appeal (1).

Ronan, K.C., and *Bolton*, for the appellant :—

The undertaking embodied in the Recorder's order forms part of the order, and is, therefore, part of a judicial act to which prohibition lies. This portion is still operative, as the judgment of Palles, C.B., contemplates the Council acting on it at a subsequent time, and it is, therefore, not too late for prohibition: Short and Mellor's Crown Practice, 2nd ed., p. 264. Prohibition goes either to the party or the Court: *Mayor of London* v. *Cox* (2). Gibson, J., says if the order is not valid there is no need for a prohibition. On the contrary, this is the very reason for granting prohibition: *Buggin* v. *Bennett* (3); *Mayor of London* v. *Cox* (2).

A. M. Sullivan, K.C., and *Rearden*, for the District Council.

Maurice Healy, for David M'Auliffe, supported the case of the District Council.

[In addition to the authorities mentioned in the Court below, the following were referred to: (for the appellant)—Short and Mellor's Crown Practice, p. 255; *Roberts* v. *Humby* (4); *Hedley* v. *Bates* (5); *Bodenham* v. *Ricketts* (6); (for the respondents)—*In re Poe* (7), judgment of Denman, C.J., pp. 687, 688.]

THE COURT OF APPEAL unanimously affirmed the judgment of the King's Bench Division, and dismissed the appeal. They held that the undertaking was not part of the order, and that the application was too late.

Solicitor for the prosecutor: *John J. Power.*

Solicitor for the District Council and Mr. M'Auliffe: *Guiney.*

W. G.

(1) The LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.
(2) L. R. 2 H. L. 239.
(3) 4 Burr. 2035.
(4) 3 M. & W. 120
(5) 13 Ch. D. 498.
(6) 6 Nev. & Man. 170.
(7) 5 B. & Ad. 681.

Appeal.
1911.
Nov. 17.

THE COUNTY COUNCIL OF THE COUNTY OF CAVAN AND THE BAILIEBOROUGH RURAL DISTRICT COUNCIL *v.* KANE, BROTHERS (1).

Highway—Locomotive—Traction-engine—Excessive weight—Injury to highway—Nuisance—Special damage—Road authority—Right of, to sue—Practice—Appeal—Orders (1905) *LVIII, R.* 15; *LXIV, R.* 7—*Enlarging time—Mistake*—Bona fide *intention to appeal.*

The use of a traction-engine which, by reason of its excessive weight does substantial and abnormal damage to a public road, adequate for ordinary traffic, is a public nuisance, even though the engine be constructed in compliance with the provisions of the Locomotive Acts, 1861 and 1865.

In such a case the duty cast upon a county council to repair such damage, and the liability of a district council to provide the funds for such repair, amounts to special damage, so as to make the owner of the traction-engine civilly liable at the suit of both bodies, suing jointly, for the cost of repairing the road.

Semble, such an action could be maintained by either body suing alone.

Where the unsuccessful party in a case stated under 27 & 28 Vict. c. 99, *bona fide* intended to appeal, to the knowledge of the opposite party, but fell into the mistake, shared by the opposite party, that the order was one from which an appeal could be taken within a year, and the position of the parties was unchanged; the Court of Appeal extended the time for appealing under Order LXIV, Rule 7.

MOTION on behalf of the defendants for an extension of time for appealing from the order of the King's Bench Division, dated 21st June, 1910: see [1910] 2 I. R. 644, where the hearing in that Division is reported.

Notice of appeal had been served on the 21st June, 1911, but this was, as now admitted, too late.

The present application was grounded on the affidavit of Mr. John K. Currie, solicitor for the defendants, which stated that immediately after the decision in the Court below his clients instructed him to appeal, of which he informed the solicitor for

(1) Before THE LORD CHANCELLOR, THE LORD CHIEF BARON, and LORD JUSTICE HOLMES.

the plaintiffs; that all throughout it was the *bona fide* intention of his clients and himself to appeal, but that he erroneously supposed, as he believed also did the plaintiffs and their solicitor, that the order was a final one, from which there was a year within which to appeal; and that it was only when setting down the appeal that he was informed by the Registrar that it was late. He further stated that no alteration had taken place in the relation of the parties, and that the plaintiffs could not be prejudiced by the extension of time sought for.

Several letters were exhibited which bore out these statements.

Gordon, K.C. (with him, *S. L. Brown, K.C.*, and *M'Cutcheon*), for the defendants:—

Here a very difficult question, materially affecting the parties to this proceeding, and of great importance to the public generally, arises for decision. We are dissatisfied with the order made by the King's Bench Division, and ever since it was pronounced it has been the *bona fide* desire and intention of the defendants to challenge it in this Court. The mistake arose out of a not unnatural misconstruction by the defendants' solicitor of Gen. Order LVIII, Rules 9 and 15. He thought the order was a final one, as it unquestionably concluded a very important question, and overlooked the fact that it was not made in *an action*. It was a merely accidental slip which cannot prejudice the plaintiffs. Under these circumstances the Court will enlarge the time under Gen. Order LXIV, so as to allow the appeal to be heard and decided.

Ronan, K.C., and *Harrison, K.C.* (with them, *Macafee*), for the plaintiffs:—

There is no jurisdiction to extend the time without special grounds, and there are no special grounds shown here. Order LVIII, Rule 15, is specific in prohibiting an appeal after the respective times limited without *special* leave of the Court.

In England, so long as the corresponding English Order was in similar terms, it was held that mere mistake only was not a ground entitling the party in default to relief: *Re Helsby* (1);

(1) [1894] 1 Q. B. 142.

Appeal. 1911. CAVAN C. C. AND BAILIEBOROUGH R. D. C. *v.* KANE.

International Financial Society v. *City of Moscow Gas Co.* (1); Wylie's Judicature Practice, pp. 796, 797. So stringent was the practice felt to be, that in England the corresponding Order was amended in May, 1909, by prefixing the words "subject to and without prejudice to the power of the Court of Appeal, under Order LXIV, Rule 7." But no such amendment has been made in the Irish General Order. [HOLMES, L.J., referred to the note in the Registrar's book of *In the Arbitration War Department and Smith* (2), where it appeared that it was the practice in this country to extend the time in cases similar to the present.]

THE COURT held that it had full jurisdiction to enlarge the time, and that this was a proper case in which to do so. The practice in Ireland had been different from that which prevailed in England prior to the amendment of the English Order in 1909, and it was accordingly considered unnecessary to make any alteration in the Irish Order.

The appeal was then proceeded with.

Gordon, K.C., and *M'Cutcheon* (with them, *S. L. Brown, K.C.*), for the appellants.

Ronan, K.C., and *Harrison, K.C.* (with them, *Macafee*), for the respondents.

The arguments were in substance similar to those addressed to the King's Bench Division, reported [1910] 2 I. R., pp. 647–653.

PALLES, C.B.:—

In my opinion this appeal is incapable of argument. The finding of Lord Justice Cherry, that the road at the time of the injury was in good order and "capable of bearing the traffic ordinarily passing over it," concludes the case, and this notwithstanding that the traction-engine was constructed in compliance with the provisions of the Locomotive Act of 1865. This circumstance shows that the defendants' act was wrongful, and

(1) 7 Ch. D. 241. (2) Unreported, April 23, 1900.

amounted to a public nuisance: *Guardians Armagh Union* v. *Bell* (1). The Common Law liability incident to such an act is as well settled as anything can be. Lord Coke, treating of it in his commentary on the 68th section of Littleton, says:—

"But here is to be observed a diversity betweene a private way, whereof Littleton here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shall he not have an action upon his case; and this the law provided for avoiding of suites, for if any one man might have an action, all men might have the like. But the law for this common nusance hath provided an apt remedy, and that is presentment in the leete or in the torne, *unless any man hath a particular damage*: as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case, and all this was resolved by the Court in the King's Bench" (2).

In support of this cases are cited, some of which go back as far as Edward 4. The presentment in the leet or the torne is, in modern practice, represented by that of the Grand Jury, at the Assizes or Quarter Sessions; and, subject to this distinction, if indeed it be a distinction, the law now is the same as it was in Lord Coke's time. This is so clear that it is unnecessary to refer to the several cases cited in argument in support of it.

Thus, the only possible question is, whether the plaintiffs here have sustained a particular damage. They are bound by statute to keep the road in repair, and have necessarily incurred additional expense in the performance of this statutable duty by making good the damage wrongfully caused by the defendants. It appears to me to be idle to contend that this expenditure—or even the liability to incur it—is not particular damage within the meaning of the Common Law rule I have mentioned. It is in fact "damage." It is not common to every member of the community, or indeed to any one. It is peculiar to the plaintiffs alone. We have, therefore, a wrongful act and consequent damage,

(1) [1900] 2 I. R. 371, 383. (2) Co. Lit. 56 (*a*).

Appeal. 1911.

CAVAN C. C. AND BAILIEBOROUGH R. D. C. v. KANE.

Palles, C.B.

an *injuria* and a *damnum*—a *damnum* not common to the public or the community—and their concurrence constitutes a cause of action. It has been argued that this cannot be so, as the action could not have been sustained by the Grand Jury prior to our Local Government Act, 1898, and that the effect of that Act was not to impose a new liability on the defendants in respect of such a matter as the present. Even assuming this to be so, the liability here is not a new one. The particular procedure of action was not available before the Act, but that new procedure is in respect of a liability existing before, and at the time of, the Act.

The reason why, before that Act, the Grand Jury, the body charged with the repair of the road, could not sustain such an action, was because it was not incorporated: *Clements* v. *County Council of Tyrone* (1). But neither Grand Jury nor the inhabitants were without remedy. An indictment lay; and upon a verdict of guilty the Court had power to impose a fine, which usually included the cost of reinstatement. The effect of the incorporation of the County Council, and the imposition on it of the duty to repair, has been to aggregate into one single sum so much of the damage sustained by each member of the community as is common to all, and to vest in that single body, the County Council (or possibly in either one of two bodies, the County Council and the District Council), the legal right to recover this aggregate sum. An action to enforce this legal right cannot be within the Common Law rule founded upon its abhorrence of multiplicity of actions.

In my opinion the order appealed from must be affirmed.

THE LORD CHANCELLOR and LORD JUSTICE HOLMES concurred.

Solicitor for the appellants: *J. K. Currie.*
Solicitor for the respondents: *Francis M'Brien.*

W. G.

(1) [1905] 2 I. R. 415, 542.

INDEPENDENT NEWSPAPERS, LIMITED, *v.* GREAT NORTHERN RAILWAY COMPANY (IRELAND).

Gibson, J.
1912.
Dec. 6, 16.

(1912. No. 8603.)

Railway company—Equal charges—Newspapers carried by passenger trains—Application of section 90 of the Railways Clauses Act, 1845 (8 Vict. c. 20) (1)—Company bound by profession.

In an action brought under section 90 of the Railways Clauses Act, 1845, complaining of inequality of charge in respect of newspapers carried by defendants by passenger trains from Dublin, as compared with newspapers carried from Belfast, the rate was a flat rate, irrespective of distance, for carriage over the entire of the defendants' railway, and the train times and average length that the respective papers were carried were different.

Held, that (1) though there was no statutory charge prescribed, and though the defendants were not bound to carry papers by passenger trains, still, as they professed to do so, section 90 applied to preferential treatment in respect of such papers: *Stone's Case* ([1904] 1 K. B. 689) discussed and distinguished.

(2) Any cause of action under section 90 was confined to the portion of the line between Dublin and Belfast.

(3) The circumstances of the traffic from Dublin and from Belfast were not the same, and the action therefore failed.

Semble, a flat rate irrespective of distance is not within the section.

Quaere, whether the mere circumstance that the points of departure were different, necessarily and as a matter of law, would take the case out of the section. The *Denaby Case* (11 A.C. 97) considered.

ACTION tried before Gibson, J., sitting without a jury, on the 6th December, 1912.

The material facts in evidence are sufficiently referred to, as are the arguments of counsel, in the judgment of the learned Judge.

(1) The material portion of section 90 of the Railways Clauses Act, 1845, is as follows:—"Provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Gibson, J.
1912.

INDEPENDENT NEWSPAPERS *v.* GT. NORTHN. RY. CO. (IR.).

The plaintiffs' statement of claim was as follows :—

1. The plaintiffs, as newspaper proprietors and publishers, forward a large number of parcels of newspapers daily from the terminus of the railway system of the defendants in Dublin for carriage by the defendants to Belfast and other stations on the said railway system. The rates charged by the defendants to the plaintiffs for the said carriage are and have been for many years one halfpenny per pound on parcels of newspapers outwards from Dublin, and one farthing per pound on return parcels of unsold newspapers.

2. During the period of six years prior to the 30th June, 1912, the defendants, unknown to the plaintiffs, have carried over their system from their terminus in Belfast parcels of newspapers sent to them for carriage over their railway system to Dublin and other stations by the various newspaper proprietors in Belfast, at a lower rate, namely, at a reduction of thirty-three and one-third per centum on the charge of one halfpenny per pound for outward parcels of newspapers from Belfast, and have carried the return parcels of unsold newspapers for the said Belfast newspaper proprietors free.

3. The plaintiffs have been compelled by the defendants to pay the rates mentioned in paragraph one hereof, in ignorance of the rates charged for the same service to the Belfast newspaper proprietors, as in paragraph two hereof described, and the plaintiffs claim £2329 13*s.* 2*d.*, being the amount of overcharges which they have been compelled to pay to the defendants as aforesaid.

PARTICULARS.

Amount paid to the defendants by the plaintiffs for the carriage of parcels of newspapers outwards for six years prior to the 30th June, 1912,	£5889	5	11			
33⅓ per centum on said sum,	1963	2	0	£1963	2	0
Amount paid to the defendants by the plaintiffs for the carriage of return parcels of unsold newspapers for six years prior to the 30th June, 1912,				366	11	2
Total,				£2329	13	2

Statement of defence:—

1. The defendants did not forward parcels of newspapers at the rates mentioned in the first paragraph of the statement of claim, or at all.

2. The parcels of newspapers forwarded by the plaintiffs were forwarded by the defendants at the request of the plaintiffs by passenger trains, and the plaintiffs were charged a special rate for their being so forwarded. The said parcels of newspapers were not perishable merchandise, and the defendants were under no obligation to forward same by passenger train.

3. The defendants have not carried over their system from their terminus in Belfast parcels of newspapers at the rates mentioned in the second paragraph of the statement of claim, or at all.

4. The parcels of newspapers forwarded from the terminus of the defendants in Dublin did not pass only over the same portion of the line of the defendants' railway, or under the same circumstances as the parcels of newspapers carried by the defendants from their terminus in Belfast.

5. The plaintiffs did not pay the sums alleged in the statement of claim to have been paid by them.

6. The plaintiffs did not pay the said sums in ignorance of the rates charged to the Belfast newspaper proprietors.

Plaintiffs' reply:—

1. The plaintiffs, as to the defence, say they join issue.

2. The plaintiffs will object that paragraph two of the defence discloses no answer to the statement of claim.

3. The defendants are estopped from saying that they were under no obligation to forward parcels of newspapers as alleged in paragraph two of the defence, or that there was no inequality in the rates charged for parcels of newspapers, because the defendants before action brought admitted such obligation and such inequality, and represented to the plaintiffs that such inequality would be removed.

S. Ronan, K.C., W. G. Gibson, K.C., and *E. S. Murphy*, for the plaintiffs.

John Gordon, K.C., Denis Henry, K.C., and *F. F. Denning*, for the defendants.

Gibson, J.
1912.

INDEPENDENT NEWSPAPERS *v.* GT. NORTHN. RY. CO. (IR.).

Dec. 16.

GIBSON, J.:—

This action is the first of the kind in Ireland, and the grounds of defence put forward make it of much importance to our mercantile community, and, particularly, to Press interests. The form of undue preference, known as inequality, is frequently secret and undisclosed. Where such preference becomes known the protection of the Railway Commission, under the Acts of 1854 and 1888, can be invoked, but such protection is confined to future scales of charge, and affords, save under the Act of 1888, chapter 25, sections 12 and 13, no redress in respect of excessive payments that may have been actually exacted from consignors, whose remedy may be found in particular equality sections.

The writ bases the cause of action on section 90 of the Act of 1845, and the argument has been substantially addressed to that enactment. The statement of claim, however, does not purport to be so restricted, and several sections in the Company's special statutes have been referred to as possibly supporting an independent right of action. The pleading ought to have distinguished these two separate causes of action, and set forth the special enactments founding the second cause of action. The result has been that defendants' counsel have had no sufficient opportunity of dealing with this aspect of the case. The point, however, may be open on the claim, and, if it was not, an amendment should be allowed, as the facts are not in dispute, and the complaint of overcharge arises on those facts.

The correspondence discloses what was admitted inequality, constituting a breach of the Act of 1854. Such breach, however, cannot be the subject of action: *Rhymney Railway Company* v. *Rhymney Iron Company* (1), though damages for undue preference might be awarded under the Act of 1888, chapter 25, sections 12 and 13, subject to special conditions, if applicable.

A brief summary of the relevant facts will be sufficient. The plaintiffs, for six years before action, paid the defendants a rate of $\frac{1}{2}d.$ per pound on newspaper parcels outward from Dublin to be carried over any part of the defendants' railway system,

(1) 25 Q. B. D. 146.

irrespective of distance, and ¼*d.* per pound on parcels sent back to Dublin. Such rate was described as a flat rate. During the same period Belfast papers were charged, nominally, ½*d.* per pound on consignments outward from Belfast, but 33⅓ per cent. was taken off, and no charges at all were made in respect of returned parcels. The Company received a special reduction of advertisement charges as a kind of compensation. The value of this reduction was not proved.

The plaintiffs, having heard, in some way, of this inequality of treatment, the matter was brought by the plaintiffs' manager, Mr. Brewster, in March, 1907, to the notice of Colonel Plews, defendants' traffic manager, who, from oversight or otherwise, denied the existence of any such inequality. This interview was relied on by the plaintiffs' counsel for the purpose of proving that plaintiffs made the overcharge payments in ignorance, and not for the purpose of founding thereon a substantive cause of action based on its being Colonel Plews' duty to know: *Derry* v. *Peek* (1), or on the company's possessing the knowledge (even if their agent did not) and being responsible as if they made this false statement directly, such statement causing damage from the delay occasioned to the plaintiffs in the assertion of their statutory rights under the Act of 1854, the Act of 1888, or otherwise. The method of remedy, however, adopted by the defendants—Belfast increase and not Dublin reduction—makes the damage very doubtful, and I express no opinion whatever on the point; it has not been argued, and it does not arise on this action as framed.

The correspondence gives the subsequent history of this case. The result was the plaintiffs' grievance was, to their disappointment and surprise, met, not by an equivalent reduction of charges to the Belfast standard, but by a proportionate increase of the Belfast charges, levelling up, not levelling down. The prompt withdrawal by the defendants of the entire advantage enjoyed by Belfast would indicate that the topics ingeniously relied on before me as justifying differential treatment were not supposed by the company to be likely successfully to pass the ordeal of examination by the Railway Commission if a complaint of undue prefer-

(1) 14 A. C. 360.

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ence, under the Act of 1854, was brought before them by the plaintiffs.

The calculations on which plaintiffs rely, if they are entitled to succeed, are not questioned. They show an overcharge on the general consignments amounting to £2329 13*s.* 2*d.*, and an overcharge in respect of parcels between Dublin and Belfast, amounting to £508 0*s.* 11*d.* Under section 90 no larger sum could be recovered than this last amount.

A salient and certain fact in this case is, that newspaper traffic in this country can only be maintained by means of passenger trains. This mode of dispatch is universal, and I am of opinion that the defendants profess, as carriers, as their tables and the conditions show, to convey newspaper parcels by such trains, though they are under no statutory obligation to do so. Newspapers, though highly perishable, in a sales point of view, as ephemeral products, are not "perishables" in the statutory meaning of the term, which contemplates only specific articles undergoing physical deterioration. The defendants, by their traffic arrangements, treat newspapers as *de facto* perishables, to be carried by passenger trains. They rightly consider that stale news, like stale fish, cannot be expected to be profitable subjects of carriage.

The argument for the defendants was confined to section 90 of the Act of 1845; it met the plaintiffs' complaint, founded on that section, with three answers:—

(1) Section 90 is confined to statutory tolls, specially authorized by legislation, and does not extend to charges for carriage of goods which the company were under no statutory obligation to convey by passenger trains.

(2) The section only applies to journeys where the points of departure and arrival are the same, as well as the portions of the line traversed.

(3) The circumstances were not the same.

I shall take up these several points in order.

The defendants rely, in support of their contention, on *Stone's Case* (1).

(1) [1904] 1 K. B. 669.

Before I discuss that case I shall say a few words on the construction of this section generally. The word "toll" has, in the various sections, different meanings, as is pointed out in *Brown's Case* (1); *Barr's Case* (2). In section 90 it has the wide effect given in section 3; "any rate, charge, or other payment payable under the Special Act." Equality sections in diverse forms occur in the company's statutes. Section 90 differs from the equality section in the defendants' special Acts, and appears to be modelled on the Great Western Railway form in their statute 7 & 8 Vict. c. iii, section 50, which, however, uses the term "charges," not "tolls."

For the purposes of the present inquiry three kinds of charges for carriage may be considered: (1) Where there is a prescribed maximum, in which case the variation cannot extend beyond such maximum; (2) where there is no such maximum for the carriage of goods which the company is bound to carry, in which case the variation is only subject to the restriction of reasonableness; (3) where the goods are carried by the company by virtue of their general statutory capacity as a corporation, but without any statutory obligation. The statute, unquestionably, applies to the second case as well as to the first: *Crouch's Case* (3); *Sutton's Case* (4). Does it apply to the third? The mischief is certainly the same, where the company professes to carry and have a recognized and regular tariff. Suppose the company, dealing with Dublin papers, had given a secret rebate to one, would not that be an abuse of their statutory powers, and contrary to the object of section 90? The obligation to carry passengers' luggage is limited, sometimes by statute, sometimes by regulation, to luggage of specified dimensions or weight; for luggage outside that limit, the company may, at discretion, impose reasonable charges. Would they be at liberty to alter the application of such charges, as between individual customers? Or, take such a case as *Wilkins's Case* (5), where commercial travellers' goods were carried free. Could the company have discriminated in the

(1) 9 Q. B. D. 741.
(2) [1905] 2 K. B. 113.
(3) 9 Ex. 556.
(4) L. R. 4 H. L. 226.
(5) [1906] 2 K. B. 619.

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application of the privilege granted by their time-tables? The company, as a statutory corporation, is enabled to make charges in respect of services not specially required by their legislation: *Attorney-General* v. *South-Eastern Railway Company* (1); when such services are professed to be rendered by them as carriers, it would seem that the tariff they profess to charge must not be made unequal in its application.

Stone's Case (2) is, I think, distinguishable. The judgments were delivered at the close of the argument, and *Sutton's Case* (3), with its important reasoning, and *Evershed's Case* (4), with the comments of Brett, C.J., and Lord Blackburn on the meaning of "tolls," were not cited. It decides that a special collection and delivery rate for goods, which the company were not compellable to carry, could not be disintegrated and turned into a station-to-station rate in an action. There was no inequality, all traders being treated alike in the same way, and the question of inequality was excluded from consideration, as is pointed out in the judgments of the Court below and in the judgment of Lord Justice Romer. The case is discussed in the judgments of Kennedy, J., and Bray, J., in *Wilkins's Case* (5), and is explained in the above sense. That a rebate, under the circumstances in *Stone's Case* (2), allowed to one customer and not to another, would be undue preference, is stated by Mr. McNamara in his well-known treatise (edition 1908, p. 249), and, indeed, is practically admitted by the correspondence and the company's action in this matter. I think such rebate would be inequality. The company profess to carry newspapers by passenger trains; though not obliged to do so, they are bound by their profession: *Johnson* v. *Midland Railway Company* (6); *Oxlade's Case* (7). Equality clauses are to be strictly construed as against the company, and liberally in favour of the public: *Parker's Case* (8). What is struck at is a rate in actual operation, whether such rate is specifically or impliedly authorized, and inequality in the incidence of such rate.

(1) 5 A. C. 473.
(2) [1904] 1 K. B. 669.
(3) L. R. 4 H. L. 226.
(4) 14 Q. B. D; 3 A. C., p. 1038.
(5) [1906] 2 K. B. 614.
(6) 4 Ex. 475.
(7) 15 C. B. (N. S.) 680.
(8) 7 M. & G. 253.

If *Stone's Case* (1) is accepted as deciding that the plaintiffs have no remedy under section 90, it would probably equally apply to the equality clauses in defendants' special Acts.

(2) The defendants' second proposition is founded on the *Denaby Case* (2), where the marginal note certainly represents that, to come within section 90, the goods must pass between the same points of departure and arrival. The section, however, does not, in express language at least, contain any such limitation; the condition it prescribes is, that the goods are to pass "only over the same portion" of the railway "under the same circumstances." The reference to the identity of starting-points and destinations, respectively, was appropriate on the facts before the Court in the *Denaby Case* (2); but, though difference in points of departure and arrival must form weighty reasons in fact against the circumstances being the same, I doubt if it, *per se*, as a matter of law, when the circumstances are, in fact, the same, would take the case out of the section. I question if the House of Lords intended to introduce such implied restriction into the section. Take two rival traders in towns A and B, connected by a ten-mile line of railway; the trader in town A, seeking to establish a competitive branch of business in B, and the trader in B trying to retaliate in A. The circumstances of the traffic being identical, *qua* carriage, could the Company quote for A a lower rate than for B, and thus prefer A to the prejudice of B? Of course, if *Denaby's Case* (2) decides that there can be no actionable inequality where, though the same portion of the line is travelled, the starting and arrival points are transposed, no question can arise. As, however, I read the decision, its language was directed to the particular circumstances for consideration, and was not intended to import into the section, already restricted in operation, a further limitation defining the commencement and end of the same portion of the line, with reference to departure and arrival. The section, however, is plainly confined to charges for traffic between the same points, and hence the plaintiffs can have no claim, save for the portion of the line from Dublin to Belfast. Apart from the expression "under the same circumstances," next to be considered, are the charges

(1) [1904] 1 K. B. 669. (2) 11 A. C. 47.

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from Dublin to Belfast within the section? The rate is, no doubt, applicable to that journey, but it is calculated as a flat rate on the aggregate cost of the services on the defendants' railway system, including localities beyond as well as short of Belfast. I doubt if a rate, so calculated, could be deemed to be a charge such as the section contemplates for the use of the line from Dublin to Belfast. The language seems addressed to a charge specifically made for transit between the same two places.

(3) The departure base has a most important bearing on the question of fact, namely, the condition that the circumstances must be the same; and, having regard to this element, to the difference in distances, time of transit, characters of the services rendered respectively, and, above all, the existence of the flat rate, not calculated on the traffic from Dublin to Belfast, I am of opinion that the circumstances, as defined in *Sutton's Case* (1), are not the same, and that the plaintiffs have no cause of action under section 90, notwithstanding that the overcharge to the plaintiffs exceeds the difference in the value and cost of the two services: the *Denaby Case* (2). When the statutory conditions are not fulfilled, the section has no operation.

Upon the alternative cause of action, founded on the Company's special statutes, 6 & 7 Wm. 4, c. xxxiii, sections 133, 134, and 142; 6 & 7 Wm. 4, c. cxxxii, section 145, and 10 & 11 Vict. c. cxi, section 38, were cited. The defendants' counsel were not prepared to deal with this view of the case; and, without exhaustive examination of the various enactments governing the entire amalgamated undertaking at the present day, no opinion could be safely formed or expressed. The equality sections in the enactments referred to relate to goods of the same description throughout the whole of the railway, but they do not use the expressions "the same portion of the line," or "the same circumstances." I question whether, on examination of the Company's legislation, as a whole, it will not be found that the governing statutes are the Act of 1845, section 90, and the Act of 1854, and it may be that the special sections should receive the same effect as section 90, as it would seem unlikely that parallel

(1) L. R. 4 H. L. 226. (2) 11 A. C. 97.

but dissimilar rights and remedies should exist concurrently. This branch of the case will, doubtless, be discussed before the Court *in banc*, when each party will have a full opportunity of research and examination. At present I content myself with saying that if they cannot succeed on section 90, the short and insufficient argument before me, and the few ancient statutes cited, have not satisfied me that I could or ought to decide in the plaintiff's favour.

I give judgment, therefore, for the defendants. Each party will abide their own costs of action and this argument.

Solicitors for the plaintiffs: *O'Connor & Dudley.*
Solicitor for the defendants: *C. Bailie Gage.*

C. N. K.

RUTHERFORD *v.* OUNAN AND ANOTHER (1).

K. B. Div.
1912.
May 8, 17.

Agency—Joint liability of principal and agent—Purchases on credit—Evidence of authority—Misdirection.

P. O. purchased a number of sheep from R. in a market, and gave a bill for the price of the same; he resided with his mother, B. O., on her farm, and there was some evidence that he was in the habit of buying and selling cattle for her, but there was no evidence that he had on any previous occasion purchased on credit as her agent. The bill was dishonoured on maturity, and R. thereupon sued P. O. and his mother for the price of the sheep. On the evidence aforesaid the jury found that this particular purchase, which was on credit, was made by P. O. on behalf of his mother, B. O., and with her authority; and further, that the parties intended that P. O. himself should also be liable, and awarded to the plaintiff the full sum claimed. The jury found a verdict for the plaintiff against both defendants for the said sum, the Judge declining to direct in favour of B. O. though required so to do by her counsel.

Held, that, on these facts, the verdict entered against B. O. should be set aside, and a verdict entered for her.

NEW TRIAL MOTION, on behalf of Bridget Ounan, one of the defendants.

This action was brought against Patrick Ounan and Bridget Ounan, his mother, to recover the sum of £97, being the

(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.

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price of sheep sold by the plaintiff to defendants in Drogheda market on the 11th September, 1911. The defendant Bridget Ounan in her defence denied the sale and delivery of the goods, and alleged that she was a stranger to the contract of sale, and that the defendant, Patrick Ounan, had no authority to enter into the said contract on her behalf; and, in the alternative, she pleaded a warranty that the sheep were sound, and alleged that the said sheep were suffering from disease and were not sound, and that, by reason thereof, forty-seven of them had died and were worthless. The defendant, Patrick Ounan, in his defence denied the sale and delivery, pleaded the warranty above mentioned, and lodged in Court the sum of £15 12*s.*, being the balance of the price claimed after deducting therefrom the sum of £81 8*s.* the amount by which the said sheep were worth less than if they had been of the quality warranted. Patrick Ounan gave a bill at the time of the sale to the plaintiff for the amount claimed, and, on this bill being dishonoured, the plaintiff sued both Patrick and Bridget Ounan for £97 the price for which the sheep had been sold. At the trial evidence was given by the plaintiff for the purpose of showing that Patrick Ounan lived with his mother on her farm, and bought and sold cattle for her, and had acted as her agent in the contract sued on. The details of the evidence of the witnesses examined will be found fully set out in the judgment of the Lord Chief Baron, *infra*, pp. 270, 271. At the conclusion of the plaintiff's case, and again at the close of the evidence for the defence, Babington, on behalf of Bridget Ounan, asked for a direction. The learned Judge refused to direct in favour of Mrs. Ounan, and he put the following questions, *inter alia*, to the jury:—

(*a*) Were the sheep bought, in fact, by Patrick as agent for his mother?

(*b*) With her authority?

(*c*) Was it intended between the plaintiff and Pat, at the time Pat signed the bills, that Pat should be also responsible?

The jury answered each of these questions in the affirmative, and found a verdict of £97 against both, and the Judge accord-

ingly directed judgment to be entered for the plaintiff against both.

The defendant Bridget Ounan now moved for an order that the verdict against her be set aside, and that, in lieu thereof, a verdict and judgment be entered in her favour, or in the alternative that a new trial be ordered. There was no application on behalf of the defendant Patrick Ounan, nor appearance by counsel on his behalf. At the present hearing judgment had not been actually entered by the plaintiff.

A. M. Sullivan, K.C., and *Babington*, for Bridget Ounan :—

There is no evidence of joint liability. There is a finding that Pat is liable ; and, in the absence of any evidence of joint liability, it is now too late to make an allegation that Bridget is liable. This is not a case of a sale and an account, it is a case of a sale on credit, and in such a case the plaintiff must show that in the very transaction Pat was acting as agent for a principal ; it is not enough to show even that he was a general agent ; there is here no evidence of any authority to pledge his mother's credit.

[Counsel referred to *Scarf* v. *Jardine* (1) ; *French* v. *Howie* (2) ; *Watteau* v. *Fenwick* (3) ; *Keighley* v. *Durant* (4) ; *Barrett* v. *Irvine* (5).]

Wylie contra :—

There was a question for the jury, as there was some evidence that Pat acted for his mother, and bought and sold for her on other occasions.

[Counsel referred to *Whitewell* v. *Perrin* (6).]

PALLES, C.B. :— May 17.

This is an application on behalf of Bridget Ounan, one of the defendants, to set aside a verdict and judgment entered

(1) 7 A. C. 345.
(2) [1906] 2 K. B. 674.
(3) [1893] 1 Q. B. D. 346.
(4) [1901] A. C. 240.
(5) [1907] 2 I. R. 462.
(6) 4 C. B. (N. S.) 412.

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against her for the plaintiff at the last Assizes for Fermanagh, and that in lieu thereof the verdict and judgment be entered for her, or in the alternative for a new trial, on the ground that there was no evidence of liability on her part, and on the ground of misdirection, and that the verdict was against the weight of the evidence.

The action was in many respects a peculiar one. It was brought against two defendants, Mrs. Bridget Ounan, and Patrick Ounan, her son, to recover the price of some sheep alleged to have been sold to them by the plaintiff, for which the defendant Patrick had given his bill for £97. At the trial the case was not treated as one of joint liability arising out of a joint contract to purchase by the two defendants. It was treated as a case of principal and agent; and at the close of the evidence the jury were asked by the Judge:—

"1. Whether the sheep were bought, in fact, by Patrick as agent for his mother?" (Answer)—"Yes."

"2. With her authority?" (Answer)—"Yes."

"3. Whether it was intended between the plaintiff and Pat, at the time Pat signed the bill, that Pat should be also responsible?"

That question was also answered "Yes"; but if the answers to the previous questions were right, plainly that responsibility on Patrick could only have been collateral as a surety, and not a direct liability as one of the purchasers of the sheep.

Under these circumstances, the jury found a verdict for £97 against both the defendants, and judgment was directed to be entered for the plaintiff against both. I need not say that that was, plainly, wrong. It is impossible that a verdict and judgment against both the defendants could be sustained. It may be, however, and I think it is, not yet too late to set that matter right; as I do not think a judgment conclusively determines the election until it has been actually marked. At all events I put that matter, for the present, out of consideration; and proceed to deal with the question whether there

was, in fact, any evidence of liability to the plaintiff on the part of the defendant Bridget Ounan for the price of these sheep?

First.—No express authority by Bridget to Patrick to purchase the sheep was proved: *Keighley* v. *Durant* (1); *Marsh* v. *Josephs* (2); *Barrett* v. *Irvine* (3).

Secondly.—In purchasing the sheep, the defendant Patrick did not profess to act for his mother; and therefore there could not be any ratification.

Thirdly.—There was no evidence of any holding out by Bridget to the plaintiff that Patrick was authorized by her to make the purchase; and, therefore, the case is reduced to the question, whether there was any evidence of antecedent authority in Patrick to purchase farm-stock for her on credit—not of a purchase without authority subsequently ratified.

I find from the report of the Judge that he seemed to attach considerable importance to this question of subsequent ratification. He says that at the close of the plaintiff's case "Mr. Babington asked for a direction for Mrs. Ounan, on the ground that there was no evidence that the son was acting as her agent." I gather that he declined to accede to this requisition, for he states: "I thought there was some evidence." Then, at the conclusion of the evidence for the defendants, he says: "Mr. Babington renewed his requisition"—that is, for a direction for Mrs. Ounan, on the ground that there was no evidence of agency in Pat. The Judge then adds: "I suggest that subsequent ratification might afford evidence of antecedent authority. He then asked me to rule that there was no evidence of subsequent ratification. I thought the whole question was for the jury—the relation of the parties, the time, and the subsequent dealings, &c." I take it that in refusing to accede to Mr. Babington's requisition that there was no evidence of ratification, there was misdirection, and therefore, on that misdirection alone, I am of opinion that the verdict cannot stand. But it would be a lamentable thing that in

(1) [1901] A. C. 240.
(2) [1897] 1 Ch. 213.
(3) [1907] 2 Ir. R. 462.

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a case involving only £97 there should be a second trial, and costs incurred probably to an amount exceeding the entire value of the farm. I shall therefore consider whether the evidence is sufficient to sustain a verdict against Mrs. Ounan.

There was no evidence of any holding out by Patrick Ounan to the plaintiff that the bill was authorized by her; and, therefore, the question is, Is there any evidence of antecedent general authority being given to Patrick by Bridget to act as her agent to purchase on credit? As to that question, of course all acts of hers, whether prior or subsequent, may be taken into consideration. But agency arising from implication is deemed to be limited to dealings of the same kind as those proved to have been previously had with authority. I shall read the language of Mr. Justice Story on this question (1): "If the agency arises by implication from numerous acts done by the agent, with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of the like nature. If it arises from the general habits of dealing between the particular parties, it is deemed to be limited to dealings of the same kind, and governed by the same habits. . . . In short, an implied agency is never construed to extend beyond the obvious purposes for which it is apparently created. The intention of the parties, deduced from the nature and circumstances of the particular case, constitutes the true ground of every exposition of the extent of the authority; and when that intention cannot be clearly discerned, the agency ceases to be recognized or implied." That is to say, that an implied authority in Patrick to purchase these sheep for his mother on credit cannot exceed the authority exercised by him in previous similar transactions. Now, in this case there was no evidence that there had been any sale of farm stock to Patrick, on behalf of his mother, on credit upon any previous occasion; and, in my opinion, it is impossible, on the evidence that has been given, to imply such an authority in the present case.

The plaintiff proved at the trial that he brought fifty-six sheep

(1) Story on Agency, s. 87.

to Drogheda, that he saw Patrick Ounan there, and sold them to him for 35 shillings apiece, and £1 for luck—£97 in all. He says, "I had dealings with Pat before; knew where he lived with his mother, and that he bought and sold for her." But not one particular instance is proved of any previous sale of stock to Patrick on behalf of his mother; and certainly there was no suggestion of any sale on credit. He says—"When it came to be paid, he (Patrick) said he had no money with him, and I said I would take his bill: bill given." It is said that these sheep were afterwards seen grazing on Bridget's farm, but I cannot find that the plaintiff gave any evidence as to that. Then there is the evidence of the second witness, John M'Donald. He says he resides near Slane. "The defendants' land adjoins mine. Mrs. Ounan, her brother-in-law, and her son, Pat, live on the land. I know Pat. I saw the sheep; they were grazing on the land on which the mother was living. I saw the sheep in Navan fair—four pens; about ten in each pen. Pat buys and sells for her. [To Mr. Horner]—Thomas (the brother-in-law) works the farm. Pat goes to market." The witness was cross-examined as to the *identity of the sheep, but as to that he could not say.* Now, were there evidence of previous purchases by Pat on credit, which there was not, I admit that if it were proved that, on a subsequent occasion, the same sheep were seen grazing upon her farm, that would be evidence of authority to purchase; but the cross-examination shows that witness cannot prove that the sheep he saw on the farm were the same sheep purchased from plaintiff. The witness says, "Pat buys and sells for her"; but no instance is given of that. Then there was another witness, Christopher Nulty. He swears—"I sold a cow to Patrick Ounan for £7; she is at home on his mother's land." On cross-examination he said he had a conversation with Pat later about the cow, and that he said he had sold it to his mother for £9. There is no suggestion there of agency by Pat; certainly not of any authority to purchase for his mother on credit.

I am opinion that upon the facts deposed to, as appearing upon the Judge's report, there was no evidence to go to the jury, either of a general authority by Bridget to Patrick to purchase stock for her on credit, or of any special authority being

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given to him to buy the sheep for her upon credit on this occasion; and, therefore, that the verdict, as against her, should be changed into a verdict for her. The verdict against Patrick will, of course, stand.

KENNY and WRIGHT, JJ., concurred.

Solicitors for the plaintiff: *Clarke & Gordon.*
Solicitor for Bridget Ounan: *John H. M'Cann.*

J. M.

IN RE FRY (1).

Appeal.
1912.
Oct. 28, 29.

Arrangement — Acceptance by statutory majority of creditors — Whether "reasonable and proper to be executed under the direction of the Court" — Bankrupt and Insolvent Act, 1857, sect. 353.

Where the proposal of an arranging debtor is accepted by the statutory majority of his creditors it ought to be acted on by the Court having bankruptcy jurisdiction in the matter, unless there be some specific ground for rejecting it, *e.g.*, that it is unreasonable, inasmuch as the creditors would get a substantially larger sum if the estate were wound up in bankruptcy, or because the debtor has been guilty of some act of commercial dishonesty, such as contracting debts when he knows himself to be insolvent. *In re Pelan* (unreported) stated and followed; *In re O'Neill and Young* (reported *sub nom. In re A and B, arranging debtors*) (46 Ir. L. T. R. 142), distinguished.

APPEAL by the bankrupt from the order dated the 23rd September, 1912, made by His Honour the Recorder of Belfast, whereby it was ordered that the offer of composition made by the bankrupt before bankruptcy be refused, and that the matter be turned into bankruptcy.

The bankrupt since the year 1903 had carried on business at Belfast, as a designer of cloth patterns. At that time, and for several years afterwards, his father and mother resided with him and were supported by him. His father became blind in 1907, and was thenceforward unable to earn anything. In 1905, when changing his residence, he purchased a quantity of furniture, the price of which was payable by instalments, and all the instalments were paid before and on the 31st October, 1907. He married on the 22nd October, 1908. He was at that time perfectly solvent, and had a credit balance at his bankers of £70. When he married, he left the house where he had been theretofore living with his father and mother, and made a gift to his mother of the furniture which he had so

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1912. *In re* Fry.

purchased and paid for, buying new furniture for the house he moved into at the price of £490; part of this was paid. In September, 1910, he took a large house on Annadale Road, to accommodate his father and mother as well as his own family, and to provide himself with a workshop. The rent of this house was £95. He spent a considerable sum in repairs, painting, electric installation, and other matters in connexion with the house. At the time he moved to the house on Annadale Road, and for some time before, he had a turnover of £60 a month, about £50 of which was net profit. A slump in the American linen trade then set in, and the bankrupt's business was seriously affected; his profits dwindled, and in July, 1912, he had to seek the protection of the Belfast Bankruptcy Court, and filed a petition for arrangement. On the 15th July, 1912, a preliminary meeting of creditors was held, at which considerable discussion took place; the meeting was adjourned for a fortnight, two of his largest creditors, who afterwards assented, and Mr. Alexander, the solicitor for the two objecting creditors, being appointed to investigate the bankrupt's books and accounts, and to consider what monthly instalments the bankrupt ought to pay. At the adjourned meeting Mr. Alexander announced that his clients would not consent to payment by instalments. The bankrupt's original offer of 3*s.* 4*d.* in the £ was submitted to the creditors, and eleven creditors, whose debts amounted to £746 0*s.* 11*d.*, voted for it. Two creditors—namely, the Union Advance Co., creditors for £102, and H. & G. Weiner, for £45, being the clients of Mr. Alexander—opposed. Upon the matter coming before the Court, the offer was increased to 4*s.* in the £, payable by four instalments at four, eight, twelve, and sixteen months, secured by the joint and several promissory notes of the debtor and his mother, Mrs. Fry, and further secured by the debtor vesting all his property in the official assignee. This was opposed by the Union Advance Co. and the Weiners; the Registrar passed the sitting, but on appeal the Recorder reversed the Registrar's order, and adjudicated the debtor bankrupt by the order from which the present appeal was taken. The bankrupt's unsecured liabilities amounted to £1109 8*s.* 7*d.*, assets £207 10*s.* 4*d.* None of the debts due by the bankrupt at the time of his offer

was in existence at the time of the gift of the furniture. Affidavits were made on behalf of the opposing creditors and by the bankrupt; but, owing to the conflict between the statements in them, the Court of Appeal did not rely upon them.

His Honour, in delivering judgment, said:—

My difficulty in dealing with this case is the difficulty of reconciling the decision of the Court of Appeal in *O'Neill and Young* (1) with the decision of the Court of Appeal in *Pelan's Case* (2). I am sure there must have been some proper ground for differentiating—for distinguishing the two cases; because the Court of Appeal did distinguish them. But what that ground was, I really am not informed sufficiently. I would ask respectfully that some guidance in the form of an authorized law report should be given to this Court at all events. Other Courts can look after themselves. When dealing with bankruptcy matters and applications of the particular kind now before me, I feel the need of assistance and of guidance from a superior Court, and I am most anxious honestly and respectfully and fully to follow any decision that is come to, when reasons are stated by which I can know what the Court of Appeal is really doing, and wishes me to do in similar cases when they arise. Now this case of *O'Neill and Young* (1) is one of which we have a report—not, perhaps, a very full one—in the "Irish Law Times," and the Lord Chancellor, as I quoted to Mr. Thompson when he was arguing, puts it in the end on this ground: "Having come to the conclusion here that the trading after a certain date was not commercially honest"—that is the ground—"I think it is a case in which the fullest investigation should be had." Just before he used that language the Lord Chancellor said, quoting from *In re Beck* (3), which appears to have been the only authority apparently on this case, at least in Ireland—"In *In re Beck* (3), after stating the facts of the proposed arrangement, Judge Berwick says—'Now the question he had to deal with was, whether all that was reasonable and proper as regarded all the creditors, and

(1) Reported *sub nom. In re A and B, arranging debtors*, 46 Ir. L. T. R. 142.

(2) Unreported, Feb. 28th, 1912. See note, 46 Ir. L. T. R. 290.

(3) I. R. 1 Eq. 68.

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should be sanctioned by the Court. In the present case it was admitted that there was an overwhelming majority of creditors in favour of the terms proposed to carry this arrangement, and it was for him to decide, notwithstanding that majority, whether that proposal was reasonable as regarded all his creditors, and proper to be sanctioned by the Court. Now, he was of opinion that it was not a reasonable proposition as regarded the opposing creditors. On the contrary, he thought it was most unjust as regarded them, and whether the creditors got more or less in bankruptcy . . . he believed it was a case where the Court ought to exercise the discretionary power given to it by the 353rd section, and turn the case into bankruptcy.'" What the express ground of the decision in *Pelan's Case* (1) was, I do not know. Mr. Thompson has told me, and told me most correctly, I am sure, his general impression of what the ground of the decision was. But I have no report of it. He says that the distinction is drawn between a case of fraud in *O'Neill and Young* (2), and an absence of fraud in *Pelan's Case* (1). In the Court of Appeal, the Lord Chancellor did not rest his decision on any ground of fraud. He rested it upon the ground I have mentioned. If there was fraud in *O'Neill and Young's Case* (2), I think there is fraud in this case—fraud against creditors. Here is a man who has nothing in the world except some furniture value for about £300, which he says he made a present of to his mother, the same lady who now proposes to go security, on the strength of nothing except that furniture, for the payment of the two last instalments in this arrangement. I find him taking Annadale House, quite a fine place. I think I once saw it—a place a merchant with established resources might occupy. He took it at £95 a year, including taxes. I find him laying out £146 upon it, and putting it into a suitable condition. I find him going to Hanna and Brown's, well-known people in Belfast, and laying out—I must recall that—and buying on credit £490 worth of furniture. If

(1) Unreported, Feb. 28th, 1912. See note, 46 Ir. L. T. R. 290.

(2) Reported *sub nom. In re A and B, arranging debtors*, 46 Ir. L. T. R. 142.

I thought that the decision of the Court in *Pelan's Case* (1) forced me, or was a guide to me, not to disapprove of this arrangement, I would follow that decision without a murmur. I think, however, there is a very grave question in this case about this furniture going to the mother, and I will refuse to carry out this arrangement.

M'Gonigal, K.C., and *H. M. Thompson*, for the appellant:—

In England, it has been held that where a scheme has been approved of by a sufficient number of creditors, it will be sanctioned, unless, in the words of Vaughan-Williams, L.J., there has been on the part of the debtor misconduct of such a kind "as would make it against public policy to sanction the scheme; that is, the misconduct must have been of a gross character": *In re E. A. B.* (2). In that case the official receiver had reported that the debtor had contributed to his failure by rash and hazardous speculation. And in this Court, in *In re Pelan* (1), the Lord Chancellor, in giving judgment, said that where there was a sufficient majority of creditors in favour of an arranging debtor's proposal, the arrangement should be carried through, "unless some impropriety were shown which would make it incumbent on the Court in the interest of commercial morality to refuse the offer." There the opposing creditors relied on the fact that the debtor had betted on horse races. In *O'Neill and Young* (reported as *A and B, arranging debtors*) (3), on which the Recorder relied, there was a gross offence against commercial morality, namely, obtaining credit when the debtor knew that he was insolvent. That case followed the principle early adopted in this country: *In re Beck* (4), a decision of Berwick, J. But here there was no misconduct. The creditors themselves are the persons most interested; they are the best judges of what is most for their advantage, and their deliberate conclusion ought not to be lightly disregarded by any tribunal.

(1) Unreported, Feb. 28th, 1912. See note, 46 Ir. L. T. R. 290.
(2) [1902] 1 K. B. 457.
(3) 46 Ir. L. T. R. 142.
(4) I. R. 1 Eq. 68.

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Carrigan, K.C., and *Warnock*, for the opposing creditors :—

In England, where the Registrar, who occupies a position analogous to that of the Recorder here, has rejected a scheme, the Court of Appeal will not interfere, unless satisfied that he has wrongly exercised his discretion: *Ex parte Reed*; *In re Reed* (1), *per* Lopes, L.J. Both in England and in Ireland the Legislature, when introducing this system of arrangements, while enacting that the will of the majority of creditors should prevail, thought it was only fair to safeguard the interests of the minority by vesting this controlling power (necessarily of a discretionary character) in the Judge or Registrar of rejecting the proposal on various grounds. Here there were admittedly great extravagance and want of caution on the part of the bankrupt. It may have been merely the outcome of a sanguine disposition; but it contributed to bring about the loss the creditors have to bear. Fry was really insolvent for two years previously to filing his petition, and just before he began to lapse into failing circumstances a valuable portion of his assets was abstracted by this voluntary gift. If the matter remains in bankruptcy, the gift of the furniture may be declared void: Bankruptcy (Ireland) Amendment Act, 1872, section 52. A composition extending over more than twelve months is unreasonable within the 353rd section of the Act of 1857: *In re Maclure* (2).

THE LORD CHANCELLOR, after reviewing the facts, said that he thought that in such cases, where a large majority of creditors accepted the debtor's offer, the Court ought not to refuse to sanction the proposal unless satisfied on reasonable and proper evidence, and not merely guess or suspicion, that the debtor's conduct had been immoral, reckless, or fraudulent in the incurring of debts; or that the proposal in itself was unreasonable. His Lordship thought the gift of the furniture in 1908 was *bona fide*. At that time the evidence showed that the debtor was perfectly solvent and earning a good yearly income. The most that could be alleged against him was imprudence. His Lordship did not think it possible to hold that the proposal was unreasonable, and was of opinion that the appeal should be allowed.

(1) 17 Q. B. D. 244, at p. 251. (2) I. R. 7. Eq. 176.

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HOLMES, L.J. :—

Two appeals, neither of which has been reported, were recently heard in this Court, in which the 353rd section of the Irish Bankrupt and Insolvent Act, 1857, was considered, and the contrast between which throws some light on the present case. In the first of these, *O'Neill and Young* (1), an arranging debtor, submitted an arrangement which was supported by the required number and value of his creditors, but which was held by this Court not to be reasonable and proper to be executed, on the ground that opposing creditors, who had never previously done business with the debtor, satisfied us that they had been induced by methods which we regarded as inconsistent with commercial honesty to supply him with goods at a time when he knew that his business was hopelessly insolvent. Accordingly, we held that, although the proposed arrangement would probably be more beneficial financially for all the creditors, the debtor's conduct was such as ought to deprive him of the protection of an arrangement, and he was adjudicated a bankrupt.

In the other appeal—*Pelan's Case* (2)—there was also the required support in favour of the arrangement from the creditors; but some were opposed to it on the ground that the debtor kept no books nor accounts, had been once given to bet at races, was careless and extravagant, and that insolvency was the necessary consequence of the mode in which he had conducted his business. The Recorder of Belfast had made the arranging debtor a bankrupt, but we allowed the appeal upon the ground that this was the ordinary case in which a proposal accepted by the statutory majority of creditors ought to be acted on in the absence of any specific ground for rejecting it. I am satisfied that we could only affirm the order now appealed from by overruling our judgment in *Pelan's Case* (2).

Fry carried on the business of a designer in linen patterns for many years, during which he seems to have paid his way. He

(1) Reported *sub nom. In re A and B, arranging debtors*, 46 Ir. L. T. R. 142.

(2) Unreported, Feb. 28th, 1912. See note, 46 Ir. L. T. R. 290.

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supported not only himself, but his father, who had become blind, and his mother. His house was well provided with furniture, fully paid for. In 1908 he seems to have been perfectly solvent. No debt proved against his estate was incurred until two years later. He was then preparing for marriage, and he gave his mother the furniture, bringing his wife to another house. He had somewhat extravagant ideas about his residence; but if the designing business had not received an unexpected set-back in Belfast, it is not improbable he could have continued to meet his liabilities.

Two creditors, whose debts are not a fifth of those proved, alone oppose his arrangement. They are money-lenders, who recently made advances at a high rate of interest, at which they must have known he would not have borrowed if he had not been seriously pressed by other demands. Although they lived in Belfast, they gave no evidence before the Recorder; and I pay no attention to the affidavits filed for this appeal, the important statements in which have been contradicted by an affidavit of the debtor.

In *Pelan's Case* (1) the Lord Chancellor laid down that there should be some specific reason for rejecting an arrangement supported by the large majority of the creditors. I find no such reason here. The Recorder relies entirely on the gift to the mother. But the evidence is that, at its date, the debtor was solvent; and this Court has declined, in cases of this kind, to act upon mere guess or suspicion, and I do not even find anything suspicious in this gift. Following *Pelan's Case* (1), I hold the appeal must be allowed.

CHERRY, L.J.:—

The question in this case is whether the arrangement is a reasonable and proper one to be carried out under the direction of the Court. The Recorder has held that it is not, and has based his judgment entirely upon the gift by the debtor of some furniture to his mother. He apparently thought that this was a fraud on creditors. But, as a matter of fact, all the debts now due by the debtor were incurred long after the

(2) Unreported, Feb. 28th, 1912. See note, 46 Ir. L. T. R. 290.

gift; and the debtor evidently thought—being apparently of a very sanguine disposition, as well as somewhat extravagant—that he would be able to earn sufficient money to defray all his expenses in the future. I do not see the slightest evidence of any intention on his part to defeat or delay creditors by this gift to his mother, and any attempt to set it aside must inevitably fail. No additional money could in this way be made available for the creditors. If the arrangement be not carried out, it will most certainly mean loss for all the creditors. Instead of being paid 4*s.*, they will not get 1*s.* in the £1. I am entirely of opinion that this arrangement is one which is "reasonable and proper to be executed under the direction of the Court."

Solicitors for the bankrupt: *David McGonigal & Sons.*
Solicitor for the opposing creditors: *James Alexander.*

W. G.

PHILIP WITHAM AND WILLIAM R. P. K. BETT *v.* ROBERT NOTLEY. SAME *v.* WILLIAM SLOANE (1).

Estate tail—Barring of—Common recovery—Tenant to the præcipe—Seisin of—Disseisin of tenant for life—Proof of disseisin.

In order that a common recovery should have been effective to bar an estate tail, the tenant to the præcipe must have been seised of the lands for an estate of freehold, either by right or by wrong. The presumption of law is that seisin follows the title, and the Court will not presume disseisin of a tenant for life for the purpose of upholding a recovery purporting to have been suffered by a tenant in tail in remainder.

M. N. by his will devised certain lands to D. and her minor children for their lives with remainder to F. N. in tail, with remainders over. Shortly after M. N.'s death in 1823, F. N. conveyed the lands to E. for the purpose of making him a tenant to the præcipe, and then suffered a common recovery with double vouchers with E. as tenant to the præcipe. A bill in Chancery was subsequently filed by D. and her children against F. N., alleging that he was in possession of the said lands for them, and had not sufficiently accounted for the rents and profits, and in the alternative alleging that he had wrongfully disseised them, and praying for an account, which bill was afterwards dismissed by consent, the plaintiffs' costs being paid by the defendant. In an action for rent brought against the occupying tenants of the lands by the

(1) In the King's Bench Division before GIBSON and MADDEN, JJ.

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plaintiffs, who, under the will of F. N. and subsequent conveyances, claimed the fee-simple in remainder after the death in 1905 of the survivor of D. and her children:—

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the defendants were entitled to question the validity of the recovery, and that, in the absence of proof of disseisin of D. and her children, the plaintiffs were not entitled to recover rent.

THIS was a case stated by the Right Hon. Mr. Justice Kenny as follows:—

1. Appeals in these cases were heard by me at the Leitrim Assizes in March, 1910.

2. *Fetherstonhaugh, K.C.*, and *Hynes*, were for the plaintiffs, the appellants. *Price* for the defendant in each case.

3. It was agreed that the cases should be heard together, as the points involved were identical save as to the amount of rent. The plaintiffs' case was very fully opened. It consisted of a somewhat complicated statement of title commencing in 1823, and the main point involved was as to the validity of a recovery suffered by one Francis Nesbitt in Easter Term, 1831. *Price*, for the defendants, contended at some length that the recovery was bad for the purpose of effectuating what was claimed for it, inasmuch as there was no proper tenant to the præcipe. His suggestion was that people named Doyle, who took life estates under a codicil to the will of Matthew Nesbitt, the common predecessor in title, were then in possession of the freehold, and that in order that the recovery should be effective, Thomas Egan, the tenant to the præcipe, should have had a freehold in possession.

4. The argument, *contra*, for plaintiffs was, that even if Egan was not a good tenant to the præcipe, the judgment was a matter of record that could only be reversed on a writ of error; that a *scire facias* should have been issued against the *terre* tenant; that no third parties could contest the Nesbitt title; and that as no proceedings had been taken to set aside the recovery, the Statute of Limitations was a bar to any title that might be set up against parties claiming through the Nesbitts.

5. The several deeds, will, deaths, intestacies, heirships, bills in Chancery, and Court orders that were alleged by the plaintiffs to constitute their title were all admitted, and are to be deemed to be incorporated with this case.

6. No witnesses were examined, and it was suggested that as there were nice points of real property law involved in the cases, and as the decision would govern others, it would be desirable to have an adjournment to Dublin, where authorities would be accessible. I accordingly adjourned the appeals. Various efforts were since made to have them heard, but for one reason or another more adjournments took place, and eventually on an intimation from me that if on argument I found a very serious question of law was involved I would certainly state a case for the King's Bench Division, the parties prepared a "case" which in substance is as follows, and I find accordingly.

7. The actions were for recovery of rent—in the one case for four years' arrears, amounting to £37 up to the 25th March, 1909, and in the other case for arrears amounting to £67 18*s.* up to the same date.

8. Both cases were dismissed on the merits by the County Court Judge.

9. By his will, dated the 14th of October, 1812, Matthew Nesbitt devised the lands in question to his son, Francis Nesbitt, for life, with remainders to his heirs male lawfully begotten with remainders over.

10. By a codicil to that will, dated the 30th November, 1821, the testator devised the said lands to Anne Doyle and to her five children, Anne, Susan, Alexander, John and Matthew, share and share alike, during the lives or the life of the survivor, or longest liver of them (1).

11. The testator died in 1823, and his said will and codicil were duly proved on the 3rd March, 1823 (2).

12. It is alleged that the devisee under the will, Francis Nesbitt, went into possession of the lands on his father's death; but there is no evidence whatever that he did do so, save what (if any) may be gathered from the documents in the case, and such possession is denied. Similar observations apply to the

(1) Several townlands as well as the lands in question, the townland of Cloonboniagh, were devised by the will; but Cloonboniagh alone was devised by the codicil.—REP.

(2) At the time of the testator's death all the Doyle children were minors.—REP.

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circumstances existing at the date of the deed leading to the recovery, and of the recovery itself.

13. In 1838 Henry Nesbitt and Anne Nesbitt, otherwise the said Anne Doyle, his wife, and her said five children (the devisees under Matthew Nesbitt's codicil) filed a bill in the Court of Chancery seeking for a declaration of their title to the aforesaid lands. This bill was dismissed by consent by order of the Court, dated the 27th June, 1838, the defendant paying the plaintiff's costs.

14. Francis Nesbitt, the devisee under the will, was a defendant in that suit. He had previously, in Easter Term, 1831, purported to suffer a common recovery, the deed appointing the tenant to the præcipe being dated the 9th May, 1831, and made between the said Francis Nesbitt of the first part, Thomas Blake of the second part, and Thomas Egan of the third part. The deed was enrolled on the 22nd June, 1831.

15. The Doyles, or some of them, were in possession of the lands from at least the year 1855. On the 9th June, 1855, they executed a disentailing deed, and on the 9th July, 1855, they mortgaged the lands to one Thomas Croker, and in 1864 and 1865 they sued for and recovered rent from tenants in occupation who were predecessors in title of the defendants. Rent receipts dated the 3rd January, 1864, and 17th March, 1865, given by Alexander Doyle or Nesbitt, are admitted.

16. The said Francis Nesbitt died intestate on the 9th June, 1854. He left an only son, Francis W. H. Nesbitt.

17. The said Anne Doyle and her son Alexander Doyle died in the year 1859.

18. The said Thomas Croker, the mortgagee in the mortgage from the Doyles of the 9th July, 1855, having taken proceedings in the Landed Estates Court to realize his said mortgage, an absolute order for sale of the fee-simple of the lands in question was made on the 29th July, 1863, but on the application of the said Francis W. H. Nesbitt, claiming to be interested in remainder, an order was made by Judge Dobbs and affirmed on appeal on the 15th March, 1866, restricting the sale to the life interests of the children of the said Anne Doyle then living.

19. The life interests of those children were by Landed Estates

Court deed of the 30th May, 1867, conveyed to the Earl of Leitrim, and he remained in possession or receipt of the rents up to the cesser of the estates so conveyed.

20. Matthew Doyle, the survivor of the children of the said Anne Doyle, died in March, 1905, whereupon the estates, limited by the aforesaid codicil to the will of Matthew Nesbitt to Anne Doyle and her children, determined, notwithstanding which Lord Leitrim brought an action for rent that accrued after such determination, but was defeated.

21. The said Francis W. H. Nesbitt died in the year 1879, and the plaintiffs by divers assignments from him and other acts are now, if the said common recovery is effectual, the owners of the estate in remainder to which he became entitled in possession on the death of the said Matthew Doyle in 1905.

22. The parties have now agreed that the only questions for decision are those hereinafter set forth.

The questions for the Court are:—

1. Whether the recovery suffered in 1831 was effectual to bar the entail.

2. Whether the defendants in the present proceeding are entitled to question the validity of the said recovery.

3. Whether the right to question the validity of the recovery is not statute-barred.

In the event of the Court deciding that the recovery suffered in 1831 was effectual to bar the entail, or that the defendants are not entitled to question the validity of the said recovery, or in the event of their being so entitled that their right to question the validity of said recovery is statute-barred, the dismisses are to be reversed and decrees given for the amounts respectively sued for, with costs below and of the appeals.

If the Court decides that the said recovery did not bar the entail, and that the defendants are entitled to question the validity of the said recovery, and that their right to do so is not statute-barred, the dismisses are to be affirmed with costs below and of appeal.

Dated this 20th November, 1911.

W. KENNY.

Fetherstonhaugh, K.C., and *Hynes*, for the plaintiffs.
FitzGibbon, K.C., and *Price*, for the defendants.

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GIBSON, J.:—

This case, after partial argument before the Lord Chief Justice, Palles, C.B., and myself, was adjourned on the suggestion that it might be desirable to have the matter determined in a plenary suit between the proper parties; but this having been found impossible, my brother Madden and I have now to dispose of the case. By consent the Court is to be at liberty to draw all reasonable inferences of fact. Without this consent there would be no point of law for decisoin, as the case does not find for or against disseisin, which would be a question of fact. Mere possession is not *per se* disseisin, as the judgment on the special verdict in *Taylor* v. *Horde* (1) shows. The argument has brought before us interesting archæological research, and I have examined Maitland's Mystery of Seisin and Beatitude of Seisin, and also Ames on Disseisin of Chattels, in Select Essays in Anglo-American Legal History, vol. iii. The law has changed in operation more than once in the course of centuries. Bracton's conception was not the same as Coke's; and what was law in Coke's day was much of it obsolete in the eighteenth and nineteenth centuries, when possessory ejectments replaced real actions. I do not, therefore, deem it necessary to discuss the old books; the facts before us are few and simple. The question is the validity of the recovery of 1831, which depends on whether Francis Nesbitt had then a freehold by disseisin.

The testator, Matthew Nesbitt, by his will made Francis Nesbitt tenant in tail male of the townlands therein described, with remainders over, subject to a provision for the application of two-thirds of the rents in discharge of debts. By a codicil he gave express life estates in one of the townlands, Cloonboniagh, to Mrs. Doyle and her children, subject to an annuity of £60, the effect being that Francis Nesbitt's estate tail was turned into an estate tail in remainder. On the testator's death administration with the will annexed was granted to Francis Nesbitt. The Doyle children were then all minors. The presumption would be that possession would have accompanied the legal title; and if the lands were tenanted, there would have been actual seisin through

(1) 1 Burr. 60.

the tenants: *Bushby* v. *Dixon* (1); *Parks* v. *Hegan* (2). Francis Nesbitt, claiming under the will, could not dispute the life estate under the same instrument: *Dalton* v. *Fitzgerald* (3).

The next fact was a recovery suffered by Francis Nesbitt in 1831, dealing with all the lands devised in tail in the will, and taking no notice of the life estate given by the codicil in respect of Cloonboniagh. This is the act supposed to prove an antecedent disseisin; there is no other evidence of disseisin.

In 1838, a suit was brought by the mother and children, two of them still minors, against Francis Nesbitt and the trustee of the will, asking for administration, to have the will and codicil established, and to have the plaintiffs restored to possession. The pleading is confused and contradictory; it avers that Francis Nesbitt claimed to be seised as heir-at-law; then that he was acting under the trusts of the will and codicil; and lastly, that he pretended that the rents of Cloonboniagh were less than they really were, and accounted with the beneficiaries, the plaintiffs, on a false basis. The suit was dismissed by consent in 1838, the defendants paying all costs between party and party. The Doyles must have got into possession then or subsequently, for they received rent in 1855, and in 1866 their life estates were sold. The last life dropped in 1905. On these facts: first, was there any disseisin at all?

The conclusion that I draw is, that Francis Nesbitt acted as *de facto* trustee; he apparently paid the £60 annuity out of the rents. The Doyles' title under the same testator was indisputable; and apart from the recovery, including Cloonboniagh (possibly the result of oversight or ignorance), there is no tangible evidence of any adverse claim. The Doyles' subsequent possession shows that no tortious ownership was insisted on by Francis Nesbitt. Any such claim, when the true owners knew their rights, was impossible.

Two further answers to the plaintiffs' action are relied on.

If the lands were tenanted, as the bill in Chancery would suggest, the Doyles were actually seised, and Francis Nesbitt could only be treated as disseisor by election, not as actual

(1) 3 B. & C. 298. (2) [1903] 2 Ir. at p. 647. (3) [1897] 2 Ch. 86.

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disseisor. There is no evidence that the tenants ever attorned to him as new landlord: *Doe* v. *Lynes* (1). An unanswerable objection is, however, found in the minority of the children with respect to whom Francis Nesbitt was bailiff or agent: *Howard* v. *Shrewsbury* (2). It is said that this is a purely equitable doctrine, and cannot affect disseisin of a legal estate at common law. But apart from the point that disseisin of a minor may have originally been at election only, I think that as the law stood in 1831 Francis Nesbitt had not at the time acquired a tortious freehold. This may be tested in two ways—(1) Could he have acquired the estate by adverse possession while he was bailiff or agent? At that time to confer a title under the Statute of Limitations, an analogous point, the possession must have been adverse. The question requires no answer. A bailiff or agent, while that relation continues, cannot rely on the Statute of Limitations: *Lyell* v. *Kennedy* (3); *Wilkinson* v. *Verity* (4); *Burdick* v. *Garrick* (5).

(2) Could the minors on attaining full age have executed wills or conveyances of their estates? If disseised, they could not in 1831, while dispossessed, have dealt with the property as to which they would have had only a right of entry. If Francis Nesbitt was then agent or bailiff, they would not have been out of possession at all. I cannot think that in 1831, when the fiduciary position of Francis Nesbitt was well settled, a Court of law would have held that Francis Nesbitt's possession was adverse, or that the children were incapable of devising or conveying the property.

Turning to equity proper, it is clear that it treated the possession as fiduciary and not tortious. No authority has been cited at all supporting the view that a tenant in tail in remainder could avail himself of possession so acquired as entitling him to bar an entail. What we have to consider is the state of law in 1831, not the primitive conception of disseisin; and the rules of equity now prevail.

I have dealt with the question, accepting the admission of defendants' counsel that a tenant in tail in remainder could by disseisin of the immediate tenant for life under the same title

(1) 3 B. & C. 388.
(2) L. R. 17 Eq. 378.
(3) 14 A. C. 437.
(4) L. R. 6 C. P. 206.
(5) L. R. 5 Ch. App. 233.

enable himself to bar the entail by recovery. A disseisor usually acquires a tortious fee. Mr. Preston (Conveyancing, vol. ii, p. 321) thought that a chattel interest could be obtained by disseisin, if no greater interest was claimed. *Helyar's Case* (1) is to the contrary effect. That a tenant in tail by wrongful entry on the tenant for life's estate—from which he could be at once removed by ejectment—could acquire capacity to wreck the settlement, including remainders over in which a tenant for life might have had an interest, may appear strange. As this has been conceded, I assume that the point is concluded by authority; but I offer no opinion of my own on the subject.

A further topic relied on was that the recovery was a judgment which could only be reversed on error; and as this had not been done within the statutory period allowed for that purpose, the recovery was now unassailable. This argument is manifestly hopeless. A recovery was a collusive proceeding for conveyancing purposes, not an ordinary judgment; and where there was no valid tenant to the præcipe the whole recovery was abortive; it could not be relied on as an answer to an ejectment: *Taylor* v. *Horde* (2). The statutory period for challenging errors in a recovery only relates to patent defects—to form, not to substance.

A final point was that, even if the invalidity of the recovery would be a good defence in an ejectment on the title, it was not available to tenants who were not relying on *jus tertii*—the authority of the true owner. They, however, have been paying rent throughout to the tenant for life's representatives, and are entitled to require the claimants to prove title; otherwise they might have to pay twice. It was suggested that a disseisor could give a good receipt. This is certainly not the law now, whatever may have been the law in Bracton's time; and disseisin, even if it ever existed, came to an end in 1838. In my opinion there was no disseisin, and the plaintiffs' action entirely fails. The only piece of evidence to support disseisin is the recovery itself. If not the result of mistake, it certainly is insufficient to prove disseisin of a freehold interest under the same will.

MADDEN, J., concurred.

J. G. T.

(1) 6 Coke, 25 a.

(2) 1 Burr. 60.

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June 12, 24.

The plaintiffs appealed to the Court of Appeal (1).

H. D. Conner, K.C., and *Hynes*, for the appellants :—

We submit that it is not open to the defendants in this action for rent to question the validity of the recovery suffered by Francis Nesbitt in 1831. Even if such a defence could be raised by third parties, it is barred by 10 & 11 Wm. 3, c. 14, which enacted that a recovery could not have been reversed or avoided for any error or defect therein, unless a suit were brought within twenty years after the recovery was suffered. To avoid the recovery it would have been necessary that a writ of *scire facias* should have been issued : see Cruise's Digest, Title xxxvi, Recovery, ch. xi, s. 12. The recovery is a matter of record which cannot now be challenged ; there was a solemn judgment of the Court, and a writ directed to the sheriff, and, apart from these considerations, it is to be remembered that the recovery was suffered at a date when lawyers were familiar with the essential features of a valid recovery ; there is a presumption that it was valid, especially as there have been successive devises and conveyances of the lands relying on the validity of the recovery. In any case, the onus is on the defendants to satisfy the Court that the recovery was in fact bad, and this is not discharged by establishing the fact, on which the decision of the Court below was based, that the children of Mrs. Doyle, who were entitled to life estates in the lands, were minors at the date of the recovery, and that Nesbitt entered the lands, accordingly, as trustee or bailiff for them. No doubt, under the decision in *Quinton* v. *Frith* (2), if there be an entry on an infant's estate by his guardian, or by one bound to protect the infant, or who has express notice of the infant's rights, a Court of Equity will intervene to protect the minor, but on the question of disseisin, we submit that the character in which the disseisor enters is immaterial, as "the writ of entry must be brought against one that is actually seised of the freehold by right or by wrong" : Pigott on Recoveries, 3rd ed., pp. 28, 40, 41. Therefore, if

(1) Before BARRY, L.C., and HOLMES and CHERRY, L.JJ.
(2) I. R. 2 Eq. 396.

Francis Nesbitt entered as bailiff or trustee, he, having the legal estate, got a seisin of the lands, which enabled a valid recovery to be suffered. An infant could be disseised as well as another: see Coke on Litt., l. 3, c. 6, sect. 387. Seisin implies possession, not a proprietary right. There were many ways in which possession of the infant's lands might have been got, *e.g.*, by conveyance; an infant's conveyance being voidable only, not void: see Williams' Vendor and Purchaser, p. 785. It is as reasonable now to assume that the life estates were released for the purposes of the recovery as that the recovery was bad. As to seisin in fact being sufficient to make a legal tenant to the præcipe, see Shelford's Real Property Statutes, 7th ed., 334. The bill in Chancery will be relied on as establishing that the Doyle children were minors, and that they were wrongfully disseised; but the statements in the bill cannot be taken as evidence, unless privity between the parties is established; and here there is no privity between the plaintiffs in that suit and the present defendants: *Boileau* v. *Rutlin* (1). If the bill can be taken as evidence in this action, then, as it alleges that Nesbitt was in possession and had the seisin, it establishes our case, it being immaterial whether such possession was of right or of wrong. The bill was, in fact, dismissed; and that decision could only have been reversed on a writ of error. The decision of Lord Mansfield in *Taylor* v. *Horde* (2) will be relied on by the other side, but that was "a case which profoundly dissatisfied the great conveyancers of the last century": see Law Quarterly Review, 1886, vol. ii, 488; Pigott on Recoveries, 40; Preston's Conv., 2nd ed., 60; Co. Litt., 330*b*. The interests taken by the Doyles under the will and codicil of Matthew Nesbitt were in *Nesbitt's Estate* (3) held to be life estates only; and accordingly, if the decision of the King's Bench Division be correct, the lands would have been inalienable until 1905, when the last life estate terminated.

FitzGibbon, K.C., and *F. W. Price*, for the respondents:—

It cannot be said that the defendants are not entitled to set up the defence that the recovery in question was bad, as they are

(1) 2 Ex. 665, at p. 676. (2) 1 Burr. 60. (3) 11 Ir. J. (N. S.) 349.

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entitled to see that they pay their rent to the proper parties; otherwise they might be compelled to pay twice over. As to the effect of 10 & 11 Wm. 3, c. 14, it is clear that this only created a limitation of actions to avoid recoveries on the ground of error or defect on the record, and did not set up a recovery that was inoperative through want of parties. Section 3 of 21 Geo. 2, c. 11 (Ir.), shows that, notwithstanding the provisions of section 1 of that Act, it remained necessary for a tenant for life to join in a conveyance to a tenant to a writ of entry, and admittedly this was not done in the present case. The onus lies on the plaintiffs, where title depends on the recovery, to establish that James Nesbitt was seised of the lands. If he was a disseisor, we admit the recovery was good; but it is certain that for the purposes of a recovery a tenant to the præcipe must have been seised of an estate of freehold, either by right or wrong. Here Egan was the tenant to the præcipe, and in order that he should have been seised of an estate of freehold it was essential that Francis Nesbitt should have been so seised; it is clear, however, that he was not. Even if he was wrongfully receiving the rents and profits of the lands, he could not have been seised in possession unless by the "election and will" of the owners: Coke on Litt., l. 3, c. 10, section 588. In 1831, the only way in which a minor could deprive himself of real estate was by actual feoffment, with livery of seisin of the lands. A common recovery suffered by an infant by his guardian could only be done "by Privy Seal on weighty reasons," when "upon producing this Privy Seal to the Court of Common Pleas they admit a person of known ability and integrity to be guardian, and on showing the reasons for suffering a common recovery, and proving that it is for the infant's advantage, it is done in open Court" (1). If Nesbitt entered on the lands, he did so for the use of the minors. In *Doe* v. *Keen* (2) Lord Kenyon says:—"Nothing can be clearer than that an infant may consider whoever enters on his estate as entering for his use": *Quinton* v. *Frith* (3). The judgment of Lord Mansfield in *Taylor* v. *Horde* (4) rules this case, where he held that "from the eternal principles of justice" a wrong-doer could

(1) Pigott on Rec., 2nd ed., 64.
(2) 7 Term Rep. 386.
(3) I. R. 2 Eq. 396.
(4) 1 Burr. 60.

not, by virtue of the wrongful act, acquire an advantage for himself. No doubt Mr. Preston disapproved of this judgment; but he was not unprejudiced on the point, as he twice unsuccessfully argued in *Jerritt* v. *Weare* (1), and in *Doe* d., *Maddock* v. *Lynes* (2), against Lord Mansfield's view. The decision in *Taylor* v. *Horde* (3) was re-affirmed in *Doe* v. *Horde* (4), and never overruled.

The plaintiffs cannot rely on the recovery as being equivalent to a judgment in a real action; it was merely "a common assurance and conveyance of lands": see *Dormer's Case*, Coke's Rep., part v, 40*a*; Pigott on Recoveries, p. 1. As to the writ directed to the sheriff, this was never, in fact, executed by the sheriff: Burton's Law of Real Property, p. 218.

June 24.

THE LORD CHANCELLOR:—

This is an appeal by the plaintiffs against the judgment of the King's Bench Division, declaring that the plaintiffs' title to the lands in question had not been substantiated, and that the civil bill brought for rent against the defendants should accordingly be dismissed. The lands held by the defendants are parcels of the lands of Cloonboniagh, situate in the county Leitrim. In his lifetime they were the property of Matthew Nesbitt, of Derrycarne in that county, and by his will, dated October 14th, 1912, they, with several other denominations of lands, were devised by the testator to his only son, Francis Nesbitt, in tail male, subject to certain charges, bequests, annuities, and debts. By a codicil to his will, dated October 30th, 1821, Matthew Nesbitt changed his will, to the extent of devising the lands of Cloonboniagh to a woman named Anne Doyle and to her five children, who were, no doubt, his progeny too, share and share alike during their lives or the life of the survivor. Long years afterwards a question arose regarding the true nature of the devise. It was raised in the course of proceedings for sale taken by Thomas Croker, the holder of a mortgage from the Doyles. In the first instance the Landed Estates Court had made an order for the sale of the fee-simple of

(1) 3 Price, 575.
(2) 3 B. & Cr. 388.
(3) 1 Burr. 60.
(4) 1 Cowp. 689.

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the lands. That order was challenged by Captain Francis William Henry Nesbitt, the heir-at-law of Francis Nesbitt aforesaid, and on his application to have the order for sale amended, the Landed Estates Court, by order dated March 15th, 1866, corrected the previous order for sale, and declared that the Doyles' estate in the lands of Cloonboniagh was a life tenancy only, with cross-remainders amongst the mother and the five children named. That decision was confirmed by the Court of Appeal by their judgment of June 7th, 1866. It is a significant fact, desirable to have made clear at an early stage. By the codicil a charge of £64 a year was imposed on the lands in favour of the testator's brother, John Nesbitt, subject to which, as I have stated, the lands were devised to Anne Doyle and to her five children, for the estates described.

We were informed by Mr. Conner, K.C., that the Court should be at liberty to draw inferences of fact. Matthew Nesbitt died in 1823, and letters of administration to him, with his will and codicil annexed, were, on June 1st, 1823, granted to his son Francis. The conclusion, in my view, to be drawn from the case is, that Francis Nesbitt was living with his father at Derrycarne, and after the father's death he continued to live there during the rest of his life. Anne Doyle lived some distance away; the exact distance has not been indicated. The whole family appear to have lived together. Francis Nesbitt must have been busily engaged for years after the father's death in getting the affairs of the estates settled. The Doyle family did not for many years go to take physical possession of the lands of Cloonboniagh. I have come to the conclusion, however, that they were aware of the interest in the lands which had been devised to them, and I am satisfied that since the father's will became known Francis Nesbitt knew the rights of the Doyles in Cloonboniagh, and that he never in any way whatever questioned them. It would be impossible for the Court to form a confident opinion as to what the precise arrangements were, made between the Doyles and Francis Nesbitt, for a considerable period. I am satisfied that since his father's death he uniformly recognized the rights of the Doyles. From the admission made by the Doyles in their bill in Chancery in 1838, it is clear that he had been accustomed to pay them £24

a year, which, he said, was the surplus of proceeds of Cloonboniagh, after he had paid the annuity charged upon the lands by the codicil in favour of his uncle, John Nesbitt. That bill is a notable fact in this case. Then there are the admission and statement of fact I have just mentioned, and the circumstance that on June 27th, 1838, by consent of the parties, it was agreed that the bill should be dismissed, but that Francis Nesbitt and the other defendant named William Pennefather, who had been named as an appointed trustee of Matthew's will, should pay the plaintiffs' (that is the Doyle family's) costs of the proceedings. It is plainly to be concluded that some satisfactory further arrangement was come to. Probably, there was an improvement for the Doyles. A definite change had taken place, at any rate, in the year 1855. From that year it is certain that the Doyles were in possession of Cloonboniagh, and, so far as it was tenanted, they and their successors in the property received the rents from it, down to 1905, when the last of the Doyles mentioned in the codicil died. Prior, however, to that date the Doyles had by mortgages divested themselves of their interest in the lands, and it was on the petition of Thomas Croker, a mortgagee, in 1866, that the character of the devise was, both by the Landed Estates Court, and by the Court of Appeal, declared and defined to be that which I have already described. All this time, accordingly, Francis Nesbitt and his descendants, or the grantees from his descendants, never obtained so far as it is stated, any part of the rents and profits out of the lands of Cloonboniagh. If the Doyles in the bill of 1838 are to be credited, Francis Nesbitt professed to have fully accounted for the rents and profits of those lands in the previous years by the payment of the annuity of £60 and the surplus sums paid to them. In 1869, as I understand, Francis William Henry Nesbitt, heir-at-law of Francis, the devisee of Matthew, mortgaged his interest in Cloonboniagh, on a loan of £2000. I gather that the present plaintiffs now represent the interests of the mortgagee—the mortgage having, apparently, been a professed conveyance of the fee-simple, subject to the outstanding life tenancies of the Doyles. On the death, accordingly, of the last Doyle, life tenant, in 1905, the plaintiffs put forward claims against the defendants and other tenants

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on the lands, but heretofore, the defendants have withheld payment of rent—awaiting the vindication of the plaintiffs' title. That is the problem involved. For the better understanding of it, and shortening, I hope, of what I have to say on the case, I consider it was desirable to give the statement I have made of the general facts regarding the use and possession of the lands. The plaintiffs' title now, according to the definite statement of their learned counsel, is expressly rested on a recovery with a double voucher, suffered in the Easter Term of 1831, by Francis Nesbitt, the devisee of Matthew Nesbitt's lands, by which recovery it is contended Francis Nesbitt there and then barred the entail, and a fee-simple estate became established and vested in him. I do not, by that language, intend to convey that the learned counsel for the plaintiffs maintained that the Doyle estate was interfered with or got rid of—though I am unable to recall what definite position they were prepared to concede the Doyles would and did hold throughout in the case. Both the learned counsel fought the question of title on the recovery of 1831; and, according to my notes, Mr. Conner, K.C., said plainly that the plaintiffs' title, as now presented at any rate, was admitted to be subject to the validity of that recovery.

On the will and codicil taken together it is not possible to suggest—and indeed it never was suggested—that on his father's death Francis Nesbitt was anything else but a tenant in tail of the lands of Cloonboniagh, in remainder upon the life tenancies created in favour of the various members of the Doyle family. His estate was postponed to the precedent freehold granted to the Doyles, which lasted, indeed, from Matthew Nesbitt's death, for the full period up to 1905. The question is whether or not in the facts of the case, as, to my mind, they existed, it was possible for Francis Nesbitt, by the recovery suffered by him, to convert his actual estate in the lands in 1831 into a fee-simple. Admittedly, as it is well known, it was a necessary, preliminary, and essential step towards a valid recovery, to constitute a tenant to the præcipe, as a good and perfect tenant of the actual freehold of the lands. A man named Thomas Egan was, by the deed of May 9th, 1831, to which Francis Nesbitt was a party, professedly constituted such a tenant in the case of the lands of Cloonboniagh,

and he was thereby assumed to be a regular and efficient tenant to the præcipe. By that deed the whole scheme and purpose of the intended course was plainly set out, providing that Thomas Blake was to be the demandant, and that in due course Francis Nesbitt himself was to be the first voucher, and the common vouchee of the Court, the second. It is right to mention that the other lands devised to Francis Nesbitt were included in the recovery, and it may be, inasmuch as Cloonboniagh was included in the full list of lands demised to Francis Nesbitt, in the original will, that inadvertently, rather than by any design, these special lands were introduced into the deed and into the remaining proceedings. And then there was the judgment eventually given in favour of Blake, but who, under the arrangement, had to hold the fee-simple adjudged to him in favour of Francis Nesbitt, his heirs, and assigns for ever. The validity of the course taken essentially depends on Thomas Egan having been, at the time, a good and perfect tenant of the actual freehold of the lands—and unless he was, the whole proceeding, so far as we are now concerned, was invalid and abortive. Francis Nesbitt had no estate depending on any title which would warrant him in making Egan a tenant of the actual freehold. The case relied on is placed wholly on the basis that Francis Nesbitt was, in 1831, a disseisor of the lands, and in full possession of them, and, therefore, qualified to make a valid tenant to the præcipe for the purpose of the recovery. The mere continuance of Francis Nesbitt at Derrycarne and on the lands, after the death of his father, was not a disseisin to justify the view presented here. Having considered the authorities, so far as they were produced, or I could trace them, it would not, in my judgment, be possible to hold that there had been any disseisin of Cloonboniagh, within the meaning of the law pressed on us by the learned counsel for the appellants. A mere naked possession on the part of Francis Nesbitt, who never challenged the estate of the Doyles in the lands, and from the death of Matthew paid the net proceeds from them to the Doyles, up to the time when the latter, in fact, took the entire control, could not, in any sense of the term, be regarded as a disseisin. Francis Nesbitt never made any claim or attempt to oust the

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Doyles, and, so far as the evidence goes, there is not a trace of his desire to do so in the formal inclusion of Cloonboniagh in the deed, making Egan the tenant of the freehold in the lands. He had no power or title to do so; he had no possession or estate to validate the attempt, if his action were conscious, so far as Cloonboniagh was concerned, to invest Egan with the tenancy in freehold, for the purpose of the proceedings for recovery. The Doyles never had any knowledge of the proceedings, and were in no way concurring parties in it. Lord Coke describes disseisin in simple and striking words at 153 (*b*) of his Commentary upon Littleton. He says that "Disseisin is a putting out of a man out of seisin, and ever implieth a wrong." In the same paragraph he, later on, said—"And of ancient time a disseisin was defined thus: 'Disseisin est un personel trespasse de tortious ouster del seisin.'" In 153 (*b*) Lord Coke referred to opinions of others, but, I think, the two short sentences I have quoted clearly represent his own opinion, and it is in all places taken to do so. A reference also to 257 (*b*) in the Commentary will show that he there also said—"It is to be understood that there is a force implied in law, as every trespasse and rescous and disseisin implieth a force and is *vi et armis.*" Lord Coke was there speaking of the writ of entry, and the damages recoverable. To the same effect was Bracton's view in the matter, and it is further said that Lord Coke adopted his definition. He has enumerated various modes of disseisin, wherein the main distinction taken, between disseisin and trespass, appears to be founded on the criteria and character of the acts of the disseisor, as whether the putting out was *violenter, injuste et sine judicio,* and so as to a keeping out, if the possession had been vacant, whether it were *animo clamandi,* or *contra voluntatem possidentis.* I have quoted from the note on p. 600 of *Jerritt* v. *Weare* (1).

The judgment of Baron Graham in *Jerritt* v. *Weare* (1) has a close bearing on the present controversy. The head-note is as follows:—"A lease by a stranger, and entry by the lessee, is not a disseisin in fact, without any entry by force, or an avowed intention to disseise." In his judgment in the case the learned

(1) 3 Price, 575.

Baron, referring to the judgment of Mr. Justice Aston in *Doe* v. *Horde* (1) summarized the decision in the latter case by the following statement :—"Mr. Justice Aston, reasoning on the doctrine of recoveries, held that none could be suffered, without the concurrence of the party having the estate for life; and that the deed could only authorize a recovery with the consent of the tenant for life and tenant in tail. Sir Robert Atkyns, however, having contrived to get possession, his levying a fine to make a tenant to the præcipe was held a fraud for want of the concurrence of the jointress, and the estate went to the person entitled under the limitation. The cases would be stretched to an unsustainable latitude if a tenant by sufferance, or tenant at will, making a lease the mere act, should be construed to amount to a disseisin. A manifest intention to oust must be clearly shown." The case will be recognized as that appearing in Smith's Leading Cases under the title *Taylor* d. *Atkyns* v. *Horde* (2). But the occasion was another hearing, and not that at which Lord Mansfield gave his judgment. The relevance and force of Baron Graham's summary are manifest, but a few sentences from Judge Aston's judgment itself in 1 Cowper, at p. 698, appear to be exactly applicable to the present case, and decisive of it. He says: "The great question upon the record is, whether a common recovery suffered in the year 1710 by Sir Robert Atkyns, the younger, is a good recovery. If it is, it has barred the lessor of the plaintiff's right. But that depends on these circumstances: First, whether Sir Robert Atkyns, the younger, was, at the time of the recovery suffered, tenant in tail in possession or tenant in tail in remainder; and secondly, if he was tenant in tail in remainder only, whether there was a good tenant to the præcipe." At p. 702, he stated, "The ground of our opinion, therefore, is founded on this: that here there was no actual nor constructive disseisin; Sir Robert Atkyns gained no freehold by it, he had only a naked possession: there was no ouster of the true owner; but the freehold remained not displaced, with Dame Anne, remainder in tail to Sir Robert Atkyns." I cannot but say that if the names were changed that decision would be an apt

(1) 1 Cowper 689. (2) Smith's L. Cas., 10th ed., vol. ii, p. 559.

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and striking judgment in the present case. Sir Robert was relying on the possession by the fine, but he had not obtained the surrender of the precedent estate of Dame Anne as jointress, and she had in no way concurred in the attempt to constitute a real tenant to the præcipe. That is exactly what happened in principle in the case now before the Court. The authorities demonstrate that the real state of affairs disclosed in this case vitiates the recovery of 1831, in relation to the lands of Cloonboniagh. There was no intention of an ouster of seisin on the part of Francis Nesbitt. He was in no sense a disseisor of the outstanding freehold of the Doyles, and we know that it actually existed continuously up to the year 1905. He was not in the position to make Egan a tenant to the præcipe, in the case of Cloonboniagh. To adjudge Francis Nesbitt, in the circumstances, as a disseisor would be to misunderstand the history of the doctrine and its not unnatural growth in the conditions of life prevailing in periods long removed. The notion would be against the whole foundation and spirit of the law. Not therefore being qualified to do so, it was in the actual situation a perfunctory and fruitless attempt on Francis Nesbitt's part, if conscious as regards Cloonboniagh, to make Egan a tenant of it to the præcipe. I need not occupy further time by references to the report of *Taylor* d. *Atkyns* v. *Horde* (1) and the judgment of Lord Mansfield. I have said already that the case has, in principle, a rare analogy to the present one before us, and the result ought to be the same. The judgment of the learned Lord will attract the attention of everyone interested in the question involved; and as it is so well known and so accessible, it would be superfluous to do more than rely on its manifest application and power.

The special considerations arising from the facts that several of the children, life tenants among the Doyle family in 1831, were minors need not, I think, be dwelt on, in the general view the Court takes. But no impression must be taken that I disagree with the opinion of the learned Judges in the King's Bench in that respect. Agreeing with the judgment of the Divisional Court, the appeal must be refused with costs. This Court, however,

(1) 1 Burr. 60.

thinks that, as the facts relating to the present condition of the Nesbitt family are probably not fully known, and considering the possible effect of further knowledge on the plaintiffs' ability to have their title perfected, the most prudent order to make is that the civil bills be dismissed, but without prejudice.

HOLMES, L.J.:—

The two civil bills which led to the statement of this case by Kenny, J., were brought to recover rents payable by two yearly tenants of portions of the lands of Cloonboniagh in County Leitrim. There is no doubt that the rents sued for are payable to some person. The tenants paid rent down to the year 1905 to Colonel Clements, whose interest in the lands was an estate for the life of Matthew Doyle, who died in March of that year. The plaintiffs' predecessors in title had more than thirty years previously purchased what they believed was the fee-simple of the lands, subject to certain life estates, of which the last was that of Matthew Doyle; and assuming that, on his death, their estate had vested in possession, they issued civil bills in 1909 for the rent then due. It was, of course, necessary for them to show their title, which was of a very complicated character, and in which the crucial point was the effect of a common recovery, with double vouchers, suffered by Francis Nesbitt in the year 1831. If this had the effect of barring an estate in tail male in remainder then vested in Francis Nesbitt, and certain estates subsequent thereto, the plaintiffs are entitled to succeed; but if the recovery only converted Francis Nesbitt's estate in tail male into a base fee leaving the subsequent estates unbarred, then it would be impossible to give the plaintiffs a decree for the rent on the facts before the Court. It would be very difficult to ascertain who is entitled to it, as it would depend on births and deaths that must have occurred long since.

The only question of title raised in the case depends on a narrow point; and I hope to state the grounds of my decision with comparative brevity. In the year 1812, Matthew Nesbitt executed his will, by which he devised all his real estate, which was very extensive, including the lands of Cloonboniagh, to his son, Francis Nesbitt, in tail male, with remainder to his daughter,

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Elizabeth, in either tail general or tail male (of this there is some doubt), with remainder to several other daughters to be equally divided between them.

In the year 1821, Matthew Nesbitt, by a codicil to his will, gave the lands of Cloonboniagh to Anne Doyle, and her five children, share and share alike, during their lives or the life of the survivor or longest liver of them, with certain further directions as to their respective shares, which it is unnecessary for me to quote, inasmuch as it was long afterwards decided by the Landed Estates Court and the Court of Chancery Appeal that the true construction was to give a succession of life estates, of which the last to come to an end was that of Matthew Doyle, who, as already mentioned, died in 1905. There is no question that, subject thereto, the limitations of the will of 1812 apply to the lands of Cloonboniagh.

Matthew Nesbitt died in 1823, and his son, Francis, obtained letters of administration, with the will and codicil annexed. It is obvious that Mrs. Doyle was the testator's mistress, and that he was the father of the children. They were supported in some way, and the natural inference is that their support was derived, as the testator intended, from the lands of Cloonboniagh, of which they were made tenants for life. The next step in the title is the common recovery in 1831. There was included in it all the lands devised to Francis in tail male by the will of 1812; and by a deed of the 9th May, 1831, purported to convey all these lands, including Cloonboniagh, to Thomas Egan, as tenant to the præcipe; and the fictitious judgment and record included Cloonboniagh as well as the other lands. The proposition on which counsel for the plaintiffs and appellants rely is, that when a tenant in tail in remainder had previous to his suffering a common recovery disseised a prior life tenant, he was, for the purpose of creating a tenant to the præcipe, in the same position as a tenant in tail in possession—in other words, if the latter has actual seisin of the freehold, it is immaterial whether such be by right or wrong.

In 1831, most, if not all, of the Doyle children were minors, and there has been some discussion as to whether the remainderman could disseise an infant tenant for life; but, as I hold that there

is no evidence of disseisin on which the Court can act, it is unnecessary for me to consider this difficult question.

By consent of the parties, we are at liberty to draw inferences of fact, and I am unable to draw from the evidence the inference which would entitle the plaintiffs to succeed, much as I would desire to do so. I start with the proposition that, *prima facie* and until the contrary is proved, seisin and possession must be assumed to go with title, and there is no doubt that from the year 1823 the life estates were as of right vested in the Doyles; and it is equally certain that they have been in receipt of the rents from the year 1855. There is actual evidence of this, and it is unlikely that living witnesses could go farther back. Therefore, this fact is rightly found in the case stated.

There is not any evidence of seisin or possession from 1823 to 1831, except the fact that the Doyles were entitled thereto; and I cannot assume the contrary. The deed executed in that year preliminary to the common recovery includes the lands of Cloonboniagh, but this is no evidence against the Doyles; nor is the fictitious judgment that followed, which being in all respects regular on its face, could not be questioned by writ of error.

Thus matters stood, down to the year 1838, when Mrs. Doyle, her husband, and five children, the devisees under the codicil of 1821, filed a bill in the Court of Chancery, seeking for a declaration of their title to the lands.

It alleges that Francis Nesbitt, the defendant, had dispossessed them, and contains, in the mode of pleading then in use, the allegation of pretences put forward by him. Plaintiffs' counsel argue that we can only have regard to the bringing of such an action, and that the allegations of the suppliants are not evidence against their clients. As, however, the plaintiffs rely on the bill to prove disseisin, they cannot, I think, object to its averments; nor can they say that we are not at liberty to consider the result which was given in evidence by themselves. The bill was dismissed by consent soon after it was filed, the defendant paying the suppliants' costs. The natural inference from this is that the plaintiffs were advised that they could not succeed. This could not have arisen from their not being

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entitled to the lands, as of this there has never been any doubt. The reason is probably to be found in one of the pretences alleged to have been put forward by the defendant Francis Nesbitt. This was, that he claimed to have collected the rents for the persons entitled, and that, after paying an annuity of £60 charged on the lands, there only remained £25 a year, which he paid to the suppliants. The inference I draw is that he acted, or purported to act, as the suppliants' agent; and that the object of the bill was to obtain from him an account, to avoid which he paid the costs, leaving the tenants for life to manage the lands for the future. This, so far from proving disseisin, would be inconsistent with it; and I am obliged to draw an inference that defeats the plaintiffs. I regret it because they paid a high price for what they were doubtless advised was a good title, and there may not be any other claimants. No one up to the present has sought to enforce his right by litigation; and it is possible, if not probable, that when F. W. H. Nesbitt in 1869 and 1870 conveyed the lands subject to the life estate to the plaintiffs' predecessors in title, he was the owner in remainder of either the whole or a large undivided share of the fee-simple estate. It is very unlikely that the children of Matthew Nesbitt, other than his son Francis, who took under the will of 1812 estates in remainder to his estate in tail male, ever thought that they would have any real interest in the lands of Cloonboniagh; and if they had all died without issue and intestate as to these lands before 1870, F. W. H. Nesbitt would have been then entitled thereto as their heir-at-law. I find in the first edition of Sir Bernard Burke's Landed Property that Francis was his only son, and that but one of his daughters married, becoming the wife of a clergyman called Nugent, and mother of one child—a daughter, born more than sixty years ago.

I think that, as hitherto there has been no other claimant, it would be more satisfactory to dismiss the civil bills without prejudice; but of course the plaintiffs must pay all the costs of the present litigation.

CHERRY, L.J.:—

Three questions have been stated for the determination of the Court in this case by Kenny, J., namely:—

(1) Whether the recovery suffered by Francis Nesbitt in 1831 was effectual to bar the entail?

(2) Whether the defendants in the present proceedings are entitled to question the validity of the recovery? and

(3) Whether the right to question the validity of the recovery is not statute-barred?

The answer to the first question depends upon whether Francis Nesbitt was seised in possession of a freehold estate in the lands at the time that the recovery was suffered. He could not have been rightfully so seised, as there is no doubt that under a codicil to the will of Matthew Nesbitt, which conferred the estate in tail male upon him, the Doyle family were entitled to an estate for their joint lives in the lands of Cloonboniagh. The Doyles' life estate only terminated in 1905, and there is no doubt that for fifty years prior to that date they were in possession by virtue of the devise to them by Matthew Nesbitt.

The contention of the plaintiffs here is that, although Francis Nesbitt was only entitled to an estate in remainder in the lands, he had, prior to 1831, disseised the Doyles; and they argue that under the old law a tenant in tail in remainder, who had wrongfully entered prior to the determination of the life estate, had by disseisin a sufficient estate to appoint a tenant to the præcipe, and so could effectually bar the entail. The case was argued in the Court below on the assumption that this proposition of law was correct, though Gibson, J., appears to think that, under such circumstances, only a base fee could have been created, which would confer no estate upon the plaintiffs in the present case. In this Court it was certainly not admitted by the defendants' counsel, who argued most strenuously that the law before the Act for the abolition of fines and recoveries was the same as it is at present, and that to effect a valid recovery, the consent of the

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owners of the first estate of freehold in possession was then, as now, necessary, whether there had or had not been a disseisin. In support of this contention they relied on the 3rd section of the 21 Geo. 2, c. 11 (Ir.), now repealed, which corresponded in its terms with the 11th section of 3 & 4 Wm. 4, c. 74, at present in force.

It is not necessary for us to determine this abstruse question of law, as we are all of opinion that there is no evidence of the disseisin of the Doyles by Francis Nesbitt. The fact that the recovery itself was sufficient cannot be evidence of disseisin, as there is nothing to show that the Doyles had any notice of the proceedings. Nor can the bill in Chancery, presented in 1838, be such evidence, for it actually avers on its face that Francis Nesbitt had accounted to the Doyles for the rents and profits of Cloonboniagh, which would be, if true, inconsistent with a disseisin. It is true that it also avers adverse possession by Francis Nesbitt, but it is impossible to say which of the two inconsistent averments was true. The plaintiffs have, therefore, in my opinion, failed to establish that the recovery suffered in 1831 was effectual to bar the entail, and that they have now any estate in the lands.

On the second question, I also entertain no doubt that the decision in the Court below was correct. The plaintiffs have never been in possession or receipt of the rents and profits of these lands. The tenants who are in actual occupation are, in our view of the facts, liable to be sued either for rent or for mesne rates by the person or persons entitled in remainder under the will, after the determination of the estate in tail male of Francis Nesbitt, which occurred on the death of his only son, Francis W. H. Nesbitt, in 1879. The tenants cannot be called upon to pay their rents twice over, and they are clearly entitled to put any claimants of rent from them on proof of their title.

On the third question I also agree with the judgment of Gibson, J., that proceedings by writ of error only relate to patent defects appearing on the record, and that when there was no valid tenant to the præcipe the whole proceedings were void *ab initio*. It is proceedings by writ of error only which are barred after twenty years.

The dismisses granted by the County Court Judge in these cases should therefore be affirmed; but as the plaintiffs only fail by defect of proof, and as they may be able to establish title in some other way, I think the dismisses should be "without prejudice," and not "on the merits."

Solicitor for the respondents: *R. A. Corscadden.*
Solicitor for the appellants: *J. Kiernan.*

R. ST. J. C.

Appeal.
1912.

Nov. 1, 13.

ALDRIDGE *v.* MERRY (1).

Master and servant—Compensation—Sleeping apartment—Dangerous state of roof—Accident arising "out of and in the course of" the employment—Workmen's Compensation Act, 1906, *section* 1 (1).

A domestic servant, employed in a private hotel, was called by her mistress at 6 o'clock in the morning to light the fire in the kitchen range. While in the act of getting up to do so, some mortar from the rendering attached to the slates fell into her right eye, in consequence of which she lost the sight of that eye. Handfuls of mortar had often before fallen from the slates above the servant's sleeping-room to the knowledge of her employer.

Held, that the accident arose out of and in the course of the employment.

APPEAL from an order of His Honour the County Court Judge of Waterford, whereby the application of the appellant for compensation under the Workmen's Compensation Act was dismissed on the ground that the accident did not arise out of her employment. It appeared from the Judge's notes that the appellant was employed as a domestic servant by the respondent in a private hotel at Waterford. She slept in a garret in the hotel. On May 4th, 1912, she was called at 6 o'clock in the morning by her mistress to light the fire in the range. As she was in the act of getting up a bit of mortar from the rendering attached to the slates fell into her right eye. In consequence of the injury inflicted, she had lost the sight of that eye. The appellant had been for a year and three months sleeping in the same room; the ceiling was always coming down. She made no complaint about it to the proprietor; but she once complained to the landlord of the premises, saying he ought "to get something done with the ceiling." Mrs. Merry, the employer, admitted that handfuls of the mortar were in the habit of falling from the vibration of the cars and the weather. For the respondent it was contended that there was no connexion between the employment and the

(1) Before BARRY, L.C., and HOLMES and CHERRY, L.JJ.

accident to the applicant; that the falling of the bit of mortar was not the *causa causans*, but that the subsequent treatment of the eye was what caused the injury. The County Court Judge was of opinion that the accident did not arise out of the employment, and dismissed the application with costs.

Dudley White, K.C., and *Kinahan*, for the appellant:—

The accident admittedly occurred in the course of the servant's employment, and the only ground upon which the learned County Court Judge dismissed her claim for compensation was, that it did not technically arise "out of it," within the meaning of these words as used in section 1 (1) of the Act of 1906. We submit that this was not in accordance with the current of authority. Two recent cases are extremely like the present: *Morris* v. *Mayor, &c., of Lambeth* (1), and *Blovelt* v. *Sawyer* (2). Both were cases of accidents during meal-times. In the first case, which had an element which does not exist here, alleged disobedience of orders, it was also argued unsuccessfully that the meal-time constituted a break in the employment, and that a mishap then occurring could not be said to arise out of the employment. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) did not accede to this view. Collins, M.R., said, p. 23, "The *nexus* between the applicant and his employers had not been destroyed, and it was impossible for the County Court Judge, except through the medium of a misdirection, to hold that the accident did not arise out of and in the course of the applicant's employment." In *Blovelt's Case* (2) the same learned Judge, speaking of the workman's dinner-hour, which he held to be part of the period of employment, said, p. 273: "He would be there on the contract with his master during all those hours, either directly in order to do that for which he was employed, or for some purpose ancillary thereto. That would embrace all his movements within the ambit of the factory, going or coming, or stopping there for any purpose ancillary to his work. . . . It seems to me that if the dinner-hour can be brought in as part of the time which is given by the workman

(1) 22 Times L. R. 22. (2) [1904] 1 K. B. 271.

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for some purpose ancillary to his work, such as feeding himself, which is of course essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for the purpose of eating his dinner was a break in his employment from the time that he stopped work to the time at which he began again." There it had been argued on behalf of the employer that, because the workman was not engaged on any active service at the moment the accident happened, it did not arise "out of" the workman's employment. Here sleeping at night in the room allotted to the applicant, and getting up in the morning when called by her employer, were unquestionably ancillary to her work within the words of Collins, M.R., in the cases quoted. To the same effect is *Rowland* v. *Wright* (1). This case is stronger, for the employer knew of the danger. [Counsel also cited *Andrew* v. *Failsworth Industrial Society* (2); *Challis* v. *London & S. W. Railway Co.* (3); *Pierce* v. *Provident Clothing and Supply Society* (4); *Chitty* v. *Nelson* (5); *Lowry* v. *Sheffield Coal Co.* (6).]

Hanna, K.C., and *J. M. Whitaker*, for the respondent :—

The accident did not arise out of the appellant's employment. She was not at the time engaged upon any work for her employer. Further, there was no element of special danger connected with the employment: *Warner* v. *Couchman* (7); *Craske* v. *Wigan* (8); *Peel* v. *Lawrence* (9): *Clifford* v. *Joy* (10); *Murphy* v. *Berwick* (11); *Walters* v. *Staveley Coal and Iron Co.* (12).

Dudley White, K.C., in reply :—

In *Walters* v. *Staveley Coal and Iron Co.* (12) the use of the pathway, though permitted by the employers, was optional with

(1) [1909] 1 K. B. 963.
(2) [1904] 2 K. B. 32.
(3) [1905] 2 K. B. 154.
(4) [1911] 1 K. B. 997.
(5) 2 Butterworth, 496.
(6) 24 Times L. R. 142.
(7) [1911] 1 K. B. 351, affirmed in the House of Lords [1912] A. C. 35.
(8) [1909] 2 K. B. 635.
(9) 5 Butterworth, 274.
(10) 43 Ir. L. T. R. 192.
(11) *Ibid.* 126.
(12) 105 L. T. (N. S.) 119.

the workman; and the applicant when he was injured was using it for his own convenience as a short cut. Here as far as the County Court Judge's report goes, the servant had no choice but to occupy a room with a ceiling known by the mistress to be in a dangerous state.

Nov. 13.

THE LORD CHANCELLOR, having reviewed the facts as above stated, and referred to *Blovelt* v. *Sawyer* (1), which his Lordship considered was an undistinguishable authority, held that the present case was within the Act, and that the appeal should be allowed.

HOLMES, L.J.:—

There is no controversy as to what the contract of service was. The applicant was to reside in her mistress's house during the twenty-four hours of each day and night, and to sleep in a particular room in that house, selected not by herself but by her mistress. During the whole twenty-four hours she was acting in the course of her employment; as to this there is no dispute. But, on the occasion in question, her mistress called her to light the fire in the range, and, while she was getting up for that purpose, mortar from the slates fell, as had occurred on previous occasions, and struck her in the eye; and the question is, whether this accident, arising as it unquestionably did in the course of her employment, also arose out of the employment? It seems to me that there can be no doubt on the point. Supposing she had gone down to the kitchen, and while building the fire in the range, or lighting it, a piece of the ceiling had fallen upon her and injured one of her eyes, could it be argued that the accident did not arise out of her employment? And if a similar accident occurred on her way downstairs to comply with the orders of her mistress, I do not think that it could be argued that it did not arise out of her employment. I think it would be most illogical on the facts to hold that because the accident happened before she left the bedroom it did not arise out of her employment; and I, therefore, think the appeal should be allowed.

(1) [1904] 1 K. B. 271.

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The employment of a domestic servant is continuous, as she is bound at any time, day or night, to answer and obey the orders of her mistress. In cases of sickness her attendance may be required at night. Thus, any accident that befalls her on the employer's premises must arise "in the course of" her employment.

As to the second point, namely, whether the accident arose "out of" the employment, I would have had some doubts but for two cases which I am unable to distinguish from the present: *Blovelt* v. *Sawyer* (1) and *Morris* v. *Mayor, &c., of Lambeth* (2). The collapse of the wall in the first, and of the shanty in the second, resemble exactly the falling of the mortar from the ceiling in the present case. These cases are clear authorities deciding that an accident of the kind that occurred in the present case is one arising out of the employment.

Solicitor for the appellant: *P. Buggy.*
Solicitors for the respondents: *Carlyle & Duncan.*

W. G.

(1) [1904] 1 K. B. 271. (2) 22 Times L. R. 22.

IRISH AGRICULTURAL WHOLESALE SOCIETY *v.* McCOWAN (1).

Appeal.
1913.
Feb. 17, 18.

Slander—Justification of matters of fact—Plea of fair comment as to expressions of opinion—Trading company—Imputations of insolvency and mismanagement—Discovery—Production of documents—Balance sheets—Books of accounts and ledgers—Bank-books—Relevancy—Practice—Order XXXI, Rules 13-15.

In an action of slander brought by a limited company trading on the co-operative system and registered as a friendly society, the defendant pleaded, *inter alia*, the truth in their ordinary sense of the words spoken so far as they were allegations of fact, and fair comment as regards expressions of opinion. The defamatory matter was contained in a speech delivered by the defendant, and the only allegations of fact in it were statements of the assets and liabilities of the Society on the expiration of three several years. Under an order for discovery the Society's secretary and manager made an affidavit, the schedule to which disclosed the balance sheets for these years, and also the Society's ledgers, books of account, and bank books, claiming no privilege. In accordance with notice by the defendant the Society produced the balance sheets for his inspection, but declined to produce the remaining scheduled documents. The balance sheets agreed with the figures quoted by the defendant in his speech. On the Society admitting on the order the truth of the figures quoted by the defendant and of the balance sheets, the Court of Appeal, affirming the order of Boyd, J., declined to order the production of the Society's books.

The Kent Coal Concessions v. *Duguid* ([1910] 1 K. B. 904; A. C. 452) distinguished.

APPEAL from an order made by Boyd, J., on the 4th February, 1913, refusing the defendant's application for the production for his inspection of the several documents set forth in the schedule to the affidavit of R. M. Smith, filed on behalf of the plaintiffs on the 13th January, 1913. The action was brought for slander, in respect of a speech delivered by the defendant at the reception by Mr. T. W. Russell, Vice-President of the Department of Agriculture, of a deputation from the commercial community of Ireland, at the Royal College of Science in Dublin, on the 19th April, 1912, for the expression of their views and opinions,

(1) Before PALLES, C.B., and HOLMES and CHERRY, L.JJ.

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as to the advisability of the State making a grant to the Irish Agricultural Organization Society, or of such a grant being made by the Development Commissioners. The plaintiff Society was registered as a Friendly Society, and carried on co-operative trading in connexion with the Irish Agricultural Organization Society. The defendant was a trader in the county of Kerry, and was opposed to the co-operative system, and did not believe in its soundness or prospects of success. In his speech he referred to the plaintiff Society in terms which they by innuendos alleged imputed to them insolvency, and improvident and reckless management. The material defences were privilege, and justification of the words so far as they were allegations of fact merely, and fair comment so far as they were expressions of opinion. The portions of the speech relied on as defamatory, and the pleadings, are sufficiently stated in the judgment of the Lord Chief Baron, *infra*. The usual order for discovery of documents by the plaintiff Society was made on the 8th October, 1912, and an affidavit of Mr. R. M. Smith, their secretary and general manager, was filed on the 31st October, 1912. The defendant objected to this affidavit as insufficient, and contended that he was entitled to a disclosure of the following documents, not referred to in the affidavit then filed or its schedules—

(1) Bank book.

(2) Books of account and ledgers.

(3) Correspondence with Irish Agricultural Organization Society, so far only as the documents 1, 2, and 3 show the financial relationship and degree of affinity existing between the plaintiffs and the Irish Agricultural Organization Society, and the support given by the latter to the plaintiffs, and borrowings from the plaintiffs' bankers for the purpose of their business.

(4) The plaintiffs' ledgers and account books for the years 1910–1912, showing debts due by the plaintiffs, and the principal debtors of the plaintiff Society for the same period.

(5) Minute book, so far as same records financial dealings between the plaintiff Society and the Irish Agricultural Organization Society, or borrowings by the plaintiffs from their bankers during 1910–1912.

(6) Register of shareholders.

On the application of the defendant on the 10th December, 1912, Madden, J., made an order for a further and better affidavit of documents, to be made by the said Mr. Smith, on behalf of the plaintiffs. A further affidavit having been made by Mr. Smith and filed 13th January, 1913, in which privilege was not claimed for any document, the plaintiff Society, in reply to notice by the defendant, produced the Society's balance sheets for the years 1910–1912, but refused to produce their ledgers or books of account or bank books, though scheduled. An application by the defendant to inspect the same was refused by Boyd, J., on the 4th February, 1913, and the defendant appealed.

The Hon. Cecil Atkinson (with him, *Serjeant Sullivan, K.C.*) for the defendant in support of the appeal :—

The issue raised here is whether the defendant's speech on the 19th April, 1912, was true in so far as it stated facts, and was fair comment on them. This necessarily involves the financial position of the plaintiff Society, and their connexion with the Irish Agricultural Organization Society, on whose subsidies we say the plaintiff Society is dependent for its existence. The plaintiff Society by exhibiting their balance sheets admit the relevancy of these matters, but they conceal the particulars from which the balance sheets are compiled. Under Order XXXI, Rr. 13–15, we are entitled to the production of the bank books, ledgers, account books, and correspondence sought, during the period mentioned. The only grounds on which inspection can be denied are (*a*) privilege, (*b*) irrelevancy. Privilege is not raised here. Can it be said that those documents are not relevant to the issue raised? The balance sheets are useless and unintelligible without the materials from which they are made up, and on which they depend. An order similar to what we ask for was made in *Kent Coal Concessions, Limited* v. *Duguid* (1); see judgment of Farwell, L.J., at p. 915. [*British Association of Glass Bottle Manufacturers* v. *Nettlefield* (2) was also cited.]

(1) [1910] 1 K. B. 904; affirmed by the House of Lords [1910] A. C. 452.

(2) [1912] A. C. 709.

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IR. AGR. WHOLESALE SOCIETY v. MCCOWAN.

D. M. Wilson, K.C., and *Swayne* (with them, *Powell, K.C.*), for the plaintiffs:—

Some very special grounds should be shown to entitle a defendant to the inspection sought here: *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1), where justification was pleaded. Again, in *Zierenberg* v. *Labouchere* (2), the Court refused to withhold an order for particulars, where justification was pleaded generally, until the defendant obtained discovery. In both these cases all the learned Judges laid down the principle that a party who publishes a libel and pleads justification is not entitled to discovery to see whether he has a defence or not. Discovery must be limited to what is relevant and material to the real issue between the parties: *Yorkshire Provident Life Assurance Co.* v. *Gilbert and Revington* (3), where Lindley and A. L. Smith, L.JJ., both approved of *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1). The plea here is one of fair comment, not of justification: *Digby* v. *Financial News, Limited* (4). In the *Kent Coal Concessions* v. *Duguid* (5), the majority of the Court held that without the books the balance sheets were worthless, and certain portions of the books were admitted to be material. There the balance sheets were inconsistent with the statements in the libel sued on, and it was sought to discredit the balance sheets by production of the books which, assuming the balance sheets, as the defendant suggested, were false, would contradict them. But here the figures in the balance sheets are identical with those quoted by defendant in the defamatory speech (6). We do not quarrel with those figures; we admit that they are true and accurate.

It is upon the question of fair comment that this case must be fought out, and to a plea of fair comment what is contained in the ledgers or account books is plainly irrelevant. The issue as to fair comment must be decided on the facts present to the mind of the defendant when he made the speech.

(1) 4 H. & N. 146.
(2) [1893] 2 Q. B. 183.
(3) [1895] 2 Q. B. 148.
(4) [1907] 1 K. B. 502.
(5) [1910] 1 K. B. 904.
(6) On comparison this appeared to be so.

Atkinson, in reply:—

Until now it was never admitted that the figures in defendant's speech were unassailable. We are entitled to inspect the books in order to see what percentage of the debts due to the plaintiffs are recoverable, and as to the borrowings, and how these are secured.

PALLES, C.B.:—

This is an appeal from an order of Mr. Justice Boyd refusing an application by the defendant for the production by the plaintiffs for inspection of certain documents scheduled in an affidavit made in pursuance of an order of Mr. Justice Madden. The question is, whether the documents are relevant. It was not suggested that if they are there was any privilege attached to them. The action is brought for slander alleged to be contained in certain statements made by the defendant at a meeting at which he represented a certain trading association, a rival of the plaintiffs, before the Vice-President of the Department of Agriculture. The plea upon which the question arises is a plea now very usual in form, that, in so far as matters of fact were stated, they were true in their ordinary sense; and that, so far as the statements were matters of comment, they were fair and *bona fide*, and were made upon a matter of public interest and without malice. It is not a plea of justification of the words in the sense imputed by the innuendoes. Upon that plea an issue of fact has been knit, and as to anything that bears upon the truth of the allegations of fact, no doubt Mr. Atkinson's client is entitled to have discovery. I have read the statement of claim carefully, and I find that practically all of the statements of fact are contained in paragraph 4.

> "With regard to the financial condition of the Irish Agricultural Wholesale Society on December 31st, 1909, they had £4500 cash in hands, but they owed £5000 for goods. On December 31st, 1910, that £4500 cash in hands had disappeared, and they owed the bank £2142, and increased their indebtedness from £8000 to £11,500; while in December, 1911, the debt to the bank increased to £7291, and they borrowed nearly £4000 as well, making this debt over £11,000, and they still owed about £11,500 for goods."

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So far as I can find there is no other statement of fact justified by the plea. The statement especially relied on during the argument was with reference to the sum which probably will be received out of the £24,000 admittedly due to the Society, and is essentially a matter of comment.

> "I believe there is about £24,000 due to the Society by farmers and others, how much of this is good it is difficult to say. I am aware they would not get more than two-thirds or more than £16,000 out of that sum."

I (and as I believe the Lords Justices) were, during Mr. Atkinson's argument, under the impression that the object of the discovery sought here was to impeach the balance sheets, for the purpose of showing that the statement of fact I have first referred to was true, and, of course, if that were so, it would be almost as of course to allow inspection of the accounts in the books of the Company, of which accounts the balance sheets merely represented totals. The books of the Company should be inspected for the purpose of ascertaining whether these totals were accurate or not. However, when Mr. Wilson came to speak, then we were made aware for the first time that these balance sheets, so far from being impeached by the defendant, were relied upon by him as proving the truth of his statement; and they do prove it, not only with substantial accuracy, but, I believe, almost in moneys numbered, and the truth of these balance sheets is admitted by the plaintiffs. Accordingly we are prepared to take down upon the order that the figures stated in the portions of the statement of claim I have first referred to are admitted to be true, and that the balance sheets are not impeached by the plaintiff.

Two cases were cited by Mr. Atkinson, who argued this case with conspicuous ability. One of these, *Kent Coal Concessions* v. *Duguid* (1), is more fully reported in [1910] 1 K.B. 904; the other is *The British Association of Glass Bottle Manufacturers* v. *Nettlefold* (2). The latter is a decision as to the relevancy of the particular documents there, and does not touch the present case. *The Kent Coal Company's Case* (1) was an action of libel imputing, as was alleged, insolvency to the plaintiff Company. The plea was the

(1) [1910] A. C. 452. (2) [1912] A. C. 709.

same as that in the present case, justifying as true matters of fact alleged in the libel in their natural meaning, and relying upon fair comment so far as the matters consisted of criticism or expressions of opinion. Farwell, L.J., in giving judgment, said :—

> "The defendants plead that the words are true in their ordinary signification. Anything relevant to this issue—namely, that the words are true in their ordinary signification—is proper matter for discovery, provided that the charge in the libel is by itself, or has been made by particulars, sufficiently definite to comply with the rules of the Court in libel actions. The present article appears to me to allege, amongst other things, that the plaintiff company has no chance of success, and should be avoided. The plaintiffs appear to have so read it, and have filed without objection an affidavit of documents to which they have scheduled their reports and balance sheets for 1906 and 1907, and they thereby admit that those documents are relevant. These documents refer to their accounts. The Master and the learned Judge have both held that the plaintiffs are bound to make a further affidavit scheduling those books of account in accordance with the rule established by *Jones* v. *Monte Video Gas Co.* (1). The plaintiffs are not of course bound to give the defendants permission to range at large through their books, but they are bound to schedule such portions of their books as relate to the matter set out in the balance sheets and reports already exhibited and admitted to be relevant. A balance sheet is worthless without the books from which it has been made up. When once a balance sheet is also admitted to be relevant, so much of the books as is the foundation of it is admitted to be relevant. It is clear in this case that those portions are material; of the items set out as the assets of the company a part only represents tangible assets, the rest being sums expended on expenses, directors' fees, underwriting, and the like; and the tangible assets are lumped together in such a form that nine-tenths thereof may be the cost price of expired options."

In that case all the items from which the balance sheets were made up were relevant, and the relevancy of the balance sheet showed the relevancy of the items; and the object of the discovery was, by impeaching the balance sheets, to show that the Company could not go on; but here the correctness of the balance sheets is admitted by both defendant and plaintiffs, and relied on by the defendant in support of the statement made by him, and, as a matter of fact, they sustain it.

(1) 5 Q. B. D. 556.

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There is no plea here of justification of any charge of insolvency. The defence to the statement as to the £24,000 is one of fair comment on a matter of public interest, which defendant honestly believed to be true, and spoke without malice. The questions raised thereby are as to the state of the defendant's mind, and as to the public nature of the matter; and it is quite clear that for the purpose of this plea inspection of the books cannot be ordered. These facts appear to me plainly to demonstrate that the order of Mr. Justice Boyd was right. We will preface our order by a statement that:—"It appearing to the Court that the figures in that portion of paragraph 4 in the statement of claim" which I have referred to "are substantially admitted in the balance sheets in the pleadings mentioned, and that these balance sheets are not impeached and are admitted by the plaintiffs' counsel to be true." But with this preface the order must be affirmed and the appeal dismissed with costs.

Holmes, L.J.:—

This case has been well argued for the appellant by Mr. Atkinson; and I do not say this by way compliment, but because senior counsel endeavoured to take it out of his hands in the course of his reply, which would have been not only contrary to the practice of the Court, but wholly unnecessary in the interest of his client.

The jurisdiction to order discovery, or the inspection of documents, ought to be exercised with great care, as, if what is ordered is irrelevant, the result may not only be oppressive to the opposing litigant, but injurious to persons having no connexion with the suit.

This action was brought for alleged slander contained in a speech made by the defendant on the occasion of the reception by the Vice-President and other officers of a Government Department of a deputation from merchants and traders interested in its work. This speech referred to the plaintiff Company in language which is alleged in the statement of claim to mean that the Company was in an insolvent condition and financially unsound; and was, and had been, managed in an improvident and reckless manner. Several defences have been pleaded; but the only one relied on by the appellant avers "that the words spoken, in so far as they

consist of allegation of fact, are true in substance and in fact; and, in so far as they consist of expressions of opinion, they are fair comments, made in good faith and without malice, upon the said facts, which are matters of public interest."

Turning to the speech, I find it gives as facts certain figures showing the cash in the hands of the plaintiffs, and sums owing by them, on the 31st December, in the years, 1909, 1910, and 1911, respectively.

These are the statements of matters of fact, and the rest of the speech consists of inferences therefrom and comments thereon. When the appellant's case had been fully opened, we were of opinion that the only documents which the defendant might be entitled to inspect were the plaintiffs' bank books and ledgers for the three years mentioned, and we called on plaintiffs' counsel to address themselves thereto.

I then learned for the first time that the figures I have referred to were taken with practical accuracy from the annual balance sheets of the plaintiffs. These balance sheets had been previously mentioned; but they were not opened, and I was under the impression that so far from giving the figures stated as facts in the speech, they were inconsistent therewith, and that the inspection of the ledgers was required to correct them. It now appears that, in so far as there is a defence of justification, the truth of the statement of facts is shown by the plaintiffs' balance sheets, which are binding on them; and therefore the inspection of any other documents in reference thereto would be irrelevant. The only other matters to be tried are the meaning of the language, and whether, as so understood, it was fair comment on the facts. It cannot be argued, and indeed I think that it has not been argued, that the inspection sought for would be relevant to those issues.

Therefore I hold that the appeal must be dismissed.

CHERRY, L.J.:—

I concur.

Solicitor for the plaintiffs: *George Byrne.*

Solicitors for the defendant: *M'Gillycuddy & Morphy.*

W. G.

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1913.
Mar. 7.

ALICE FLYNN *v.* EDWARD HARTE.

Right of way—Holdings held under a common landlord—Erection of gate—Presumption of grant—Prescription Act (2 & 3 *Wm.* 4, *c.* 71; 21 & 22 *Vict. c.* 42).

The plaintiff and the defendant were tenants of holdings held under a common landlord. The defendant had acquired a right of way over the plaintiff's holding. Across the end of this way, where it entered the county road, the plaintiff erected a gate for the convenient use of his holding. The defendant was allowed free ingress and egress through the gate.

Held, no obstruction of the right of way.

The law as to the acquisition of a right of way as between tenants of a common landlord considered.

Civil-bill Appeal heard by Dodd, J., at the Sligo Spring Assizes, 1913.

The civil-bill claimed £10 damages for trespass by the defendant and his servants on the plaintiff's lands, and removing and breaking a gate and posts. The defendant relied on the defence that the acts complained of were done in the exercise of a right of way to which the defendant was entitled.

The plaintiff and the defendant were tenants of holdings held under a common landlord. It was admitted that the defendant had a right of way over the plaintiff's holding. Across the end of this way, where it entered the county road, the plaintiff had recently erected the gate in question for the convenient use of his holding. The defendant was allowed free ingress and egress through the gate. He objected, however, to its being there, and entered on the plaintiff's land and removed it. The plaintiff thereupon brought the present civil-bill. The County Court Judge awarded the plaintiff £10 damages. The defendant appealed to the Judge of Assize.

Fetherstonhaugh, K.C., and *Leonard*, for the plaintiff.
Price, for the defendant.

DODD, J.:—

The controversy in this case is about a gate across a right of way. The holdings in respect of which the litigation has arisen are held under a common landlord. The right, or perhaps it would be more accurate to say *a* right, is admitted. The contest is as to whether the plaintiff is or is not entitled to put up a gate at the place where the laneway enters upon the county road. I decided in favour of the plaintiff. I was asked by some of the bar to set forth the grounds on which I proceeded, and I willingly accede.

To make my decision clear, it is desirable to trace the origin of the right of way. The law reports upon such questions since 1861 open an intensely interesting chapter in the law—statute law and Judge-made law. I commend an exhaustive study of that branch to the junior members of the Connaught Bar. I must be content with a brief outline.

At common law a right of way might be gained (*a*) by prescription, or (*b*) by grant. Prescription, running from time immemorial, of course bound everybody, and therefore bound the fee. But there were lesser interests that could only be bound, if at all, by grant. The Judges of the eighteenth century, recognizing enjoyment of a lengthened period, but not such as would establish a prescriptive right, and being desirous of having a legal origin for a well-established user, resorted to the legal fiction of a lost grant. At first juries were told that they might presume a deed between such parties as were to be bound, from continued enjoyment. The judges later told juries that such grant might be presumed, even though no such grant ever existed. And later still they told the jurors they ought to find so, in accordance with the user, and twenty years was somehow fixed upon.

The Prescription Act, 1832, was applied to Ireland by an Act passed in 1858, which came into operation in 1859. It certainly relieved prescription of much that had hindered its operation. It enacted definite periods, and made other regulations, both as to lights and other easements. It did not purport to deal with anything but prescription.

But after this date, across the right of way of every farmer who had enjoyed a way over his neighbour's farm, there were

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erected two gates which effectually barred the way. One was *Bright* v. *Walker* (1) [1834]—applicable to Ireland, if good law—which decided that the Judge-made law of a lost grant binding, and binding only, inferior interests, was abolished by the Prescription Act. And another later decision was that of *Gayford* v. *Moffatt* (2), which laid down that the occupation of a tenant from year to year was the occupation of his landlord, and a tenant from year to year could not sue an adjoining tenant of the same lessor for obstructing a way.

These two decisions seriously affected farmers in Ireland. But the grievance was not great till 1870. Up to that time the agent had control. He could, and did, intervene to prevent disputes between the tenants, and he had this *sanction* for his judgment, that he could determine the tenancy of any tenant who resisted his adjudication.

With the Land Act of 1870 there came a change. The agent could not now determine a tenancy, save at the risk of his principal having to pay compensation. He accordingly stayed his hand, and then the mischief of the two decisions I have referred to became great. If one wishes to know something of the harassing trouble they gave to the junior bar after 1870, one can find an exceedingly humourous and realistic account of his experiences in that way by Lord Justice Holmes, in his judgment in *Hanna* v. *Pollock* (3). My experience concurs. My first definite recollection of a Court of law was hearing Andrews, then a junior barrister, getting a non-suit on *Gayford* v. *Moffatt* (2). It became evident that some key, a Judge-made key if you will, must be found to open these gates.

The first reported decision that I remember is *Conlan* v. *Gavin* (4), I think in this county. The Chief Baron found, without contravening *Bright* v. *Walker* (1) or *Gayford* v. *Moffatt* (2), that a way might be implied, *either* as a way of necessity *or* as a part of the demise, the landlord having given the holding to the tenant with the way attached. This was not so much opening the gate as going round another way. The way of necessity was soon found to be hopelessly inadequate.

(1) 1 C. M. & R. 211.
(2) L. R. 4 Ch. 133.
(3) [1900] 2 I. R. 664.
(4) 9 I. L. T. R. 198.

The second alternative, however, held the field; and in *Clancy* v. *Byrne* (1), Mr. Justice Lawson in the Common Pleas adopted the finding that the way was "part of the take." But if the dominant tenement was demised at a period later than the servient tenement, what then? I boldly at the bar argued that there was nothing to prevent the Court assuming a surrender and a creation of new tenancies in each holding. But this view did not find acceptance from the Judges. There were leaseholds also to be considered, and there were tenancies from year to year under adjoining landowners, for which a lawful origin could not be found in that alternative. But was *Bright* v. *Walker* (2) right in saying that the old legal device of the constitutional English and Irish Judges of the eighteenth century, devised for justice to give a legal origin to long-established user, was for all purposes definitely abolished? Some eminent Judges in England, Mellish, L.J., and James, L.J., in *Aynsley* v. *Glover* (3) (as I recollect) expressed opinions at variance with *Bright* v. *Walker* (2). Chief Baron Pigot frankly hated it, but thought he ought, out of courtesy, to follow it: *Wilson* v. *Stanley* (4). But Chief Baron Palles held that the Court of Exchequer Chamber in Ireland, in *Deeble* v. *Linehan* (5), after the Prescription Act had applied, had recognized and acted upon the doctrine that a deed could and would be presumed binding termors, and termors only. Courtesy to the English Court of Exchequer, but obedience, and willing obedience, to the authority of the Irish Exchequer Chamber. The whole matter then came before Holmes, J., in *Timmins* v. *Hewitt* (6), and he got findings from the jury that justified the Court, over which the Chief Baron presided, in holding that either by a demise from the common landlord, or by virtue of a grant now lost, the way could be established, and some of the jury might find on one ground, and some on the other. The Court of Appeal, without deciding upon the lost grant, held that the right was established. I think I had the good fortune to be one of the first to apply the old fiction in *O'Kane* v. *O'Kane* (7). The jury found for the lost deed, and Palles, C.B., gave judgment upon

(1) 1. R. 11 C. L. 355.
(2) 1 C. M. & R. 211.
(3) L. R. 10 Ch. 283.
(4) 12 I. C. L. R. 345.
(5) 12 I. C. L. R. 1.
(6) 22 L. R. Ir. 627.
(7) 30 L. R. Ir. 489.

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the finding. The judgment was affirmed in the Court of Queen's Bench, but timidly, the course of the trial, according to the Court, precluding the defendant from raising the point. The Chief Justice, however, expressed a hope that it was good law. And lastly in *Hanna* v. *Pollock* (1), when it became my duty to argue against the decisions I have been referring to, I was so fortunate as to be beaten on the law, while holding a verdict for my client on the facts, and I think now every Irish Judge who has had to do with this matter, with the exception of Lord Justice FitzGibbon, who dissented from Lord Chancellor Walker and Lord Justice Holmes, in *Hanna* v. *Pollock* (1), has given assent to the proposition that a right of way may still be presumed from enjoyment of twenty years between two tenants, whether holding under the same landlord or not. The Court of Appeal in Ireland so decided, notwithstanding the decision of the Court of Appeal in England in *Wheaton* v. *Maple & Co.* (2).

But what is the right thus established? The tenant farmers are astute as to rights of property, and the point is made that everything shall continue exactly as it was at the time of the supposed demise or the supposed grant. But is that a reasonable contention? Picture the common landlord laying out the way. Does he dictate where each gate is to be, where each post must be erected. Was he likely to have given a way at all times, and under all circumstances, totally regardless of the farmer over whose land he was marking out the way. You are to exercise the right with as little as possible inconvenience to the other man. He must be at liberty to protect his cattle, to make gaps into his fields, as he may wish. He, on the other hand, must give you every reasonable facility. He must not give you more trouble than he can help in making you open and shut gates. In the throng of harvest the gate may be open all the day. In ordinary times the gate must be opened and closed. So much for the one alternative.

Take the other alternative, supposed grant. The idea of two farmers sitting down to draft a deed is, I admit, a rather wild one. But we must suppose them bargaining. "You must let

(1) [1898] 2 I. R. 532; [1900] 2 I. R. 664. (2) [1893] 3 Ch., p. 48.

me out whenever I want." "Yes, but you must shut the gate after you." "You'll always keep the gate where it is now." "Nothing of the kind. The five acre is in grass this year; Charley is ploughing the hill; and we may be putting cattle in the year after next. He will sow grass-seed with the oats." And so we arrive at something like the nature and extent of the grant. The defendant must have free access and regress, and the plaintiff must have a free use of his own farm; and the right granted to the defendant may be described as a right of egress and regress at all reasonable times for the beneficial use of his own holding, but subject to the plaintiff's right to use his own farm in the way most convenient. This is of course my decision solely, but I have heard the right so put by nearly every Judge. It was so well established on the North-East Circuit that an additional count which I had drafted for one case was adopted and printed as of common form by some Antrim solicitors. It ran somewhat thus:—"For that the defendant being entitled to a right of way, but subject to the condition that he would at such times as should be reasonably required shut after him such gates as the plaintiff might reasonably erect for the convenient use of his farm, did neglect and refuse to shut a gate," &c.

Whether, therefore, you call it a condition of the demise or grant, or a limitation of the right of way itself, it comes to the same thing. The evidence of user must be scanned closely. Every witness for the defendant in this case admits some kind of an obstruction, by bushes, or by sticks across, but not at this particular place. The defendant himself has a gate across the way into his own farm-yard. This he must open and shut. And he declines to allow a similar privilege to the person over whose land he has the right of way. I wish to add that I include under the words "convenient use," the amenities of a holding. The loaning may become an avenue, a gate may be put up with ornamental surroundings. A gate lodge may be added. It is no part of the duty of one administering Judge-made law to hinder the improvement in the approaches to the homestead. But the other man must get free access. He is not bound to be always calling "gate." Each case depends upon its own facts. Whether a gate is or is not an obstruction of the right is a matter of fact. He who acts in a neighbourly manner may be sure he is within the

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law. He who acts in an unneighbourly way is breaking the law, and the Judge will find out the truth and fact. The question in most cases is—convenience or "cussedness"? Convenience or "cussedness" in putting up a gate; convenience or "cussedness" in not closing a gate after passing through.

No one hearing this case could have any doubt. The gate is certainly convenient; the defendant's conduct arises from "cussedness." All the same. I think the County Court Judge gave too much. The plaintiff is a lady tenacious of her rights also. I think, a formal sum establishing her right will be sufficient, and I so decide.

Solicitor for the plaintiff: *M. J. Howley.*
Solicitor for the defendant: *P. C. P. MacDermot.*

J. G. T.

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1913.
Jan. 24, 31.

KELAGHAN *v.* DALY.

Vendor's lien—Covenant to maintain vendor.

A. assigned by deed to her son a dwelling-house and farm in consideration of natural love and affection, and of the covenants on the part of the son thereinafter contained. The deed contained a covenant by the son, that he, his executors, administrators, or assigns, would maintain A. and her daughter during their lives, and permit them to occupy the dwelling-house.

Held, that there was a lien on the lands for such maintenance which was binding as against a subsequent purchaser for value with notice.

Richardson v. *M'Causland* (Beatty 457), applied and followed.

CIVIL-BILL APPEAL.

This was an appeal from a decree made by the County Court Judge of Monaghan in favour of the plaintiff. The appeal came on for hearing before Boyd, J., at the Monaghan Spring Assizes 1912. The case was adjourned to be heard in Dublin, where it was argued and judgment delivered. The facts and the nature of the arguments sufficiently appear from the judgment.

M'Cann, K.C., for the plaintiff.
Chambers, K.C., and *Calvert*, for the defendant.

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BOYD, J. :—

I am of opinion that the decision of the learned County Court Judge in this case is right, and must be affirmed with costs.

The facts of the case are not in dispute, and the only point, which has been very ably argued on behalf of the plaintiff and the defendant, is whether under the terms of the assignment the assignor clearly intended to rely only on the personal covenants therein, and thereby waived her right as against the lands as security for the fulfilment of her arrangement with her son for the conveyance of her interest in the lands. Catherine Kelaghan, prior to the year 1906, was the tenant of 30A. 2R. 5P. of a farm of lands in the county of Monaghan, on the estate of Sewallis E. Shirley, at the judicial rent of £11 14*s*. The poor law valuation of the said holding amounted to £18 15*s*. She had a son named Peter and a daughter Lizzie living with her on the said farm, and was desirous of making a family arrangement for the benefit of herself and her son and daughter; and it was arranged between them that she should assign to her son Peter the said farm and the implements of agriculture thereon, and that he should provide for the support, clothing, and maintenance of herself and her said daughter, and for their residence in the house on the said lands, during their lives. This arrangement was carried out by a deed dated 17th December, 1906, whereby she, in consideration of natural love and affection, and of the covenants contained in the said deed, assigned all her rights in the said lands to her son Peter. The covenant in the said deed is as follows: "And the said Peter Kelaghan, in consideration of the premises, hereby for himself and his assigns covenants with the said Catherine Kelaghan that he the said Peter Kelaghan, his executors, administrators, or assigns shall henceforth clothe, support, maintain, and keep the said Catherine Kelaghan and her daughter Lizzie during their joint lives and the life of the survivor of them in a manner suitable to their condition in life; and will permit and suffer them to use, occupy, and enjoy the dwellinghouse on the said farm in the same manner as they now occupy and enjoy the same."

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It has been admitted on the argument before me that the covenant, so far as relates to the occupation of the said house, affects the lands, and that the vendor's lien in respect thereof is operative; but it has been contended that the rest of the covenant is merely personal and does not run with the lands.

Catherine Kelaghan died on the 19th May, 1907, leaving her daughter Lizzie her surviving. Peter Kelaghan, subsequent to the date of the said assignment, got into financial difficulties, and certain creditors of his took legal proceedings against him, and on 17th September, 1907, obtained judgment against him, and registered the said judgment as a mortgage against the said lands. Peter Kelaghan has left the country.

The said judgment creditors took proceedings on the Equity side of the County Court, to raise the amount of their said mortgage, and an order for sale was made therein. The premises were put up for sale under conditions settled by the said Court; and by the thirteenth of said conditions it was provided that the lands were sold subject to the burden of the covenant to which I have referred. The defendant in this case became the purchaser and the premises were assigned to him by deed dated 29th April, 1909, to hold subject "to all rights which may now be vested in Lizzie Kelaghan, under the said indenture of 17th December, 1906"; and the defendant thereby covenanted to indemnify the vendors against any breach or non-performance of the covenants which may affect the said lands "whether in favour of the said Lizzie Kelaghan" or otherwise howsoever. The civil bill in the present case has been brought against the defendant to recover damages against the defendant for the non-performance of the said covenant to clothe, support, maintain, and keep the said Lizzie Kelaghan.

I have been referred to the case of *Richardson* v. *M'Causland* (1), and I am of opinion the decision in that case entirely supports the claim of the plaintiff in this action. There is a long series of cases in which it has been considered what circumstances or covenants will or will not destroy or affect a vendor's lien for unpaid purchase-money. In *Tardiff* v. *Scrughan* (2), in the year 1785, Lord Loughborough decided that although a bond was

(1) Beatty's Reports, 457.

(1) 1 Bro. C. C. 423.

given to secure a rentcharge, the lien continued. In 1808, in *Mackreth* v. *Symmons* (1), Lord Eldon states the principles of Equity applicable to a vendor's lien, both as against the purchaser and against his assignee with notice of the contract, and he says (p. 341): "It does not appear to me a violent conclusion, as between vendor and vendee, that notwithstanding a mortgage the lien should subsist. The principle has been carried this length, that the lien exists unless an intention, and a manifest intention, that it shall not exist, appears"; and at page 350 he states, "But it depends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." Applying these principles to the present case, I am clearly of opinion that from the very nature of the provisions made in the conveyance of December 17th, 1906, it was manifestly the intention of the parties that the vendor and her daughter were not only to reside on the lands, but were also to be supported and maintained out of the profits of the lands as provided in the said deed, and that the covenant therein was part of the consideration for the said deed. There was no other source from which the son could supply the support and maintenance of his mother and sister, except from the profits of the lands conveyed to him. In the year 1827 it was decided, in the case of *Winter* v. *Lord Anson* (2), that the acceptance of a bond for the unpaid portion of the consideration money did not extinguish the lien.

In the year 1830, in the case of *Clarke* v. *Royle* (3), it was held that an agreement to convey lands in consideration of a covenant to pay an annuity showed that the consideration on one side was the conveyance of the estate, and on the other the entering into the covenants.

Again, in the year 1847, the case of *Matthew* v. *Bowles* (4) decided that the conveyance of land in consideration of a covenant to pay weekly payments to the vendor for her life, and to pay the ground rent, and to insure the premises, did not extinguish the lien for such weekly payments.

(1) 15 Ves. 329.
(2) 3 Russ. 488.
(3) 3 Sim. 499.
(4) 6 Hare, 110.

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I mention these cases as showing that covenants such as those contained in the conveyance in the present case are not severable, as contended on behalf of the defendant.

I have been referred to the case of *Austerberry* v. *The Corporation of Oldham* (1), as showing that in certain cases covenants are divisible, but the circumstances in that case are in no wise similar to those in the present case.

The defendant, both in the condition of sale and in his conveyance, had express notice of the rights of the plaintiff and is bound thereby. I therefore affirm the decision of the learned County Court Judge.

Solicitor for the plaintiff: *Henry Murphy.*
Solicitor for the defendant: *Andrew A. Wells.*

J. G. T.

Appeal,
1913.
April 18.

THE KING (HARRINGTON) *v.* THE JUSTICES OF ROSCOMMON (2).

Licensing Acts—New licence—Justices—Certificate—3 & 4 Wm. 4, c. 68, section 5—2 Edw. 7, c. 18, sections 3, 5—Valuation.

To satisfy section 5 of the Licensing (Ireland) Act, 1902, on applications for new licences, a complete and effective valuation of the premises proposed to be licensed, and one which could be made the basis of rating, must be produced to the Licensing Sessions, and a valuation, though issued from the office of the Commissioner of Valuation, which purports on its face to be provisional only, is not sufficient.

APPEAL by Patrick Harrington from an order of the King's Bench Division making absolute a conditional order for a writ of *certiorari* to quash an order made at the annual Licensing Sessions in October, 1912, granting the appellant a certificate for a publican's licence in respect of a house in Kingsland, county Roscommon, newly built by him, and completed in March, 1912. He had been previously licensed for an adjoining public-house from which he

(1) 29 Ch. D. 750.
(2) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

was evicted by the lessor, John Harrington (the prosecutor), on the expiration of the lease for which it was held.

The only question was as to the valuation of the premises. The only valuation produced by the appellant at the Sessions was in the following form :—

CO. OF ROSCOMMON.

UNION OF BOYLE.

Townland of Runnaroddan, Part of, O. S., 9.

Rural district of Boyle, No. 1.

Electoral Division of Breedoge.

Reference to Map.	Occupier.	Immediate Lessor	Description of Tenements.	Lands.			Buildings.			Total.		
				£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
7a	Pat Harrington.	In fee.	House, shop, offices, and land.	4	5	0	10	0	0	14	5	0*

NOTE—The valuation marked * is provisional, not yet having been issued for rating purposes.

The King's Bench Division, without argument, followed their decision in *R.* (*Sargent*) v. *Justices of Leitrim* (*Lynott's Case*) (1).

Denis Henry, K.C., and *Leonard*, for the appellant :—

This must, we have to admit, be treated as an appeal from *Lynott's Case* (1). The question does not seem to have been since agitated, and this is certainly the first time it has come before this Court. The whole question depends on the meaning to be put on the words "valued under the Irish Valuation Acts," having regard to the scope, objects, and purposes of the Licensing Act of 1902, in section 5 of which the words occur (2). While the statute

(1) 39 Ir. L. T. R. 145.

(2) 2 Edw. 7, c. 18, "Licensing (Ireland) Act, 1902."

Section 3.—"Where by reason of the expiration of a lease, a licence for the sale of intoxicating liquors for consumption on the premises comprised in the lease is extinguished or surrendered, the licensing authority may, notwithstanding anything in this Act, grant a licence for suitable premises in the immediate vicinity of the premises to which the licence so extinguished and surrendered was attached."

Appeal. 1913.

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was mainly passed as a temperance Act, and aimed at reducing the number of existing licences, it apparently shrunk from a too lavish sacrifice of vested interests, and in a case like the present contemplated a new licence, which would be in effect but a continuation of one pre-existing, and in respect of premises presumably well conducted to the satisfaction of the police. An essential qualification is that the newly licensed premises are to be in the immediate vicinity of those evicted or surrendered. This almost suggests the erection of new, commodious, and suitable premises. For where would existing premises suitable for a licensed public-house be found ready at hand within a small radius in one of the decayed Irish villages like Kingsland? Then, if a new building is erected, in other respects suitable, and actually valued by the Commissioner of Valuation—the proper officer appointed by the Valuation Acts—at a sufficient annual value, why should the grant of a licence be delayed until the valuation is issued for the purpose of rating, which admittedly can have nothing to do with fitness for a public-house? Here the object of the valuation is to secure fitness of character in the premises. Until the licence is obtained no business can be carried on, and the premises are unprofitable. Delay may imperil the right to the licence. Any person is entitled under 15 & 16 Vict. c. 63, section 18, to take extracts from the Valuation Lists, showing that the Legislature contemplated the use of the statutory valuation for purposes other than rating.

Fetherstonhaugh, K.C. (with him *Hynes*), for the prosecutor:—

The application was for a certificate under the 3 & 4 Wm. 4, c. 68, section 5. The Act of 1902 expressly prohibits this certificate being given, except in cases where the premises "shall be valued, under the Irish Valuation Acts," at not less than the prescribed

Section 5.—"In the case of applications under . . . section 3, . . . the premises shall be valued under the Irish Valuation Acts at not less than—£30 in the Dublin Metropolitan Police District, and the city of Belfast; £20 in the cities of Cork, Limerick, Waterford, and Londonderry; £15 in the city of Kilkenny, and the town of Galway; £12 in any other town of over 10,000 inhabitants at the census ascertained next preceding the application; and £10 in all other places."

annual amounts. This must mean a complete valuation, such as described in section 17 of the Valuation Act of 1852, from which an appeal would lie, but otherwise binding and conclusive. It cannot mean a provisional or transitory estimate liable to modification or alteration at the volition of the Commissioner.

By the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), section 43, sub-section 7, the annual value on which the duty is to be charged is not to exceed the amount of the value assigned in respect of the premises in the valuation in force under 15 & 16 Vict. c. 63, with the addition of 20 per cent. on that amount, and the licensed person may appeal against the annual value. How could the duty be assessed on anything but a complete and appealable valuation? [He was stopped by the Court.]

O'BRIEN, L.C.:—

The King's Bench Division, following its own decision in *R.* (*Sargent*) v. *Justices of Leitrim* (*Lynott's Case*) (1), held that, in the case of an application for a new licence, what has been described as a provisional valuation is not sufficient to enable the Justices to grant a certificate in the form prescribed by 3 & 4 Wm. 4, c. 68, section 5. It is clear that the duty to be assessed on a licence must be assessed having regard to the valuation of the premises. Valuation has a perfectly clear and definite meaning. It means an effective valuation, not a mere step or proceeding to a valuation. It must be an effective valuation which can be made the basis of rating.

At the time the application for a licence came before the Sessions, there was no valuation in the sense required by the statute, and the Justices could not grant a certificate. It seems to me that this ends the case.

HOLMES, L.J.:—

I concur. If we confine ourselves to the Act of 1902, I think it is clear that there was no valuation within its meaning; and if we go back to the earlier Acts, it is absolutely certain that the Legislature contemplated that to obtain a licence there should be an effective valuation in existence.

(1) 39 Ir. L. T. R. 145.

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CHERRY, L.J. :—

I concur.

Appeal dismissed with costs.

Solicitor for the appellant: *M. J. Howley.*
Solicitor for the respondent (the prosecutor): *P. C. P. Mac Dermot.*

W. G.

IN RE JANE McGLYNN AND OTHERS (1).

K. B. Div. 1912. June 11.

Poor Law—Guardians' power to assume parental control—Condition precedent—Unfitness of parent—Habeas corpus—*Poor Law (Ireland) Act*, 1899 (62 & 63 *Vict. c.* 37), *section* 1; *Poor Law (Ireland) Act*, 1892 (55 *Vict. c.* 5), *sect.* 2.

Where a Board of Guardians desire to exercise the powers of parental control over pauper children given to them by the Poor Law (Ireland) Act, 1899, section 1 (ii), a resolution to the effect that they are of opinion the parent of the child is unfit, by reason of the existence of some one or more of the conditions set out in sub-sect. (1) (ii) of that section, is a condition precedent to the exercise of such power; and accordingly where the guardians assumed parental control of children, purporting to act under such section, without having passed such resolution, the Court, upon the application of the parent, granted a writ of *habeas corpus* directed against the guardians to release such children.

A resolution, regular in form under the Poor Law (Ireland) Act, 1892, section 2, ceases to be operative if and when the parents or parent cease to be in receipt of indoor relief.

MOTION to make absolute conditional orders for *habeas corpus ad subjiciendum*.

The applicant, Jane McGlynn, together with two of her children, were inmates of the Union Workhouse belonging to the Cootehill Board of Guardians, and on the afternoon of the 10th May, 1912, while she and two of her children were such inmates, she gave an intimation to the master that she desired to be discharged from the said workhouse along with her two children, at the expiration of three hours from the time of giving such notice, as she had obtained employment in the Bessbrook Spinning Company in the county of Armagh. The master refused to grant her the discharge asked for, acting upon a resolution of the Board of Guardians which purported to authorize him to do so. The applicant wrote to the Local

(1) Before LORD O'BRIEN, L.C.J., and MADDEN, J.

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Government Board, complaining of her detention; and they replied, informing her that the master acted in the manner described under the directions of the Board of Guardians, to whom they were writing on the matter. Jane McGlynn then instituted legal proceedings, with the object of obtaining a writ of *habeas corpus* in respect of her two children. The facts connected with the case, as disclosed in the affidavits, are as follows:—

Jane McGlynn was the mother of four illegitimate children, and had been a frequent inmate of this workhouse during the past sixteen years.

On the 30th June, 1908, at a time when she and her children were inmates of the Cootehill workhouse, the guardians placed her eldest child, Mary McGlynn, out at service with a person of the same religious persuasion as that in which the child was registered, the child being then about twelve years of age; the child however, returned to the house on the 15th of July next. The mother and all her children were registered in the workhouse books as Roman Catholics. On the 28th September, 1909, she took her discharge from the workhouse, taking with her her four children, namely, Mary McGlynn, twelve years and six months; Maggie McGlynn, eleven years; Lizzie McGlynn, seven years; and Catherine McGlynn, two years and three months. On the 30th September next she returned to the workhouse, bringing with her only three of the said children. It transpired that in the interval she had placed the eldest one, Mary McGlynn, out at service with a Protestant. On the 26th July, 1911, she again took her discharge, bringing with her the three children already referred to. On the 29th of the same month, however, she returned, bringing with her only two of the children, namely Lizzie and Catherine, the other child having been placed out at service during the interval. Inquiries instituted by the guardians showed that this child also had been placed out at service with a Protestant, and it was alleged that in both cases the persons with whom the children had been placed were near relations of one of the officers of the workhouse. On the 8th September following, she and her two children were discharged by the guardians, but she was re-admitted to the

workhouse on the same evening, along with the two children, upon a ticket of admission from the relieving officer. At their meeting on the 10th of May, 1912, the guardians had under discussion the conduct of the said Jane McGlynn, and came to the conclusion that her object in placing her two children as aforesaid out at service was to evade the statutory enactments relating to the placing out at service of children under a certain age, and they passed the following resolution—Resolved—"That Jane McGlynn be not allowed to leave the house until the 24th instant, the clerk to have all correspondence relating to the matter ready for the meeting on that date." On the same day she gave notice to the master of her desire to be discharged, and of her intention to take her children with her; the master, however, refused to allow her and her children to leave, and they were accordingly detained until the 24th May. At their meeting on this latter date the guardians were of opinion that the object of Jane McGlynn in asking for the discharge of herself and her children was merely for the purpose of placing out her two remaining children at service with persons of a different religious persuasion; the guardians desired to prevent this course of conduct, and they determined to allow her to take her discharge, but to detain the two children. In so detaining the children the guardians relied on a resolution passed at their meeting on the 10th of Nov., 1911, purporting to take over the parental control of the two children of the applicant. This resolution contained no expression of opinion, or finding, that the mother came within any of the conditions set forth in section 1 (ii) of the Poor Law Act, 1899, and was as follows:—

"That Elizabeth McGlynn and Catherine McGlynn, at present maintained and kept by guardians of this union, and whose mother, Jane McGlynn, is now and has been for some time past in receipt of indoor relief in the workhouse of this union, and all other children in the workhouse at present whose parents or parent are or is now in receipt of indoor relief in the workhouse, be under the control of the guardians of this union until they attain respectively the ages of eighteen years in the case of girls, and the age of sixteen years in case of boys; and further that no officer of this

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workhouse shall under any circumstances permit the discharge of the said children until they attain respectively the ages mentioned, without the previous order in writing of the Board."

When informed on the 24th May of the determination of the guardians, Jane McGlynn refused to leave without her children, and continued in the house until the 28th, when she took her discharge without her two children.

The statutory provisions relating to this matter are as follows.

The Poor Law (Ireland) Act, 1892 (55 Vict. c. 5), section 2, is as follows:—

"Where a child is maintained by the guardians of any union . . . . whose parent is in receipt of indoor relief, the guardians shall have in respect of such child all the powers conferred on them by section 1 of the Poor Law Act, 1889, in respect to a child deserted by its parent: Provided that in respect to a child not deserted the guardians shall cease to exercise their control if the parent of such child shall cease to be in receipt of indoor relief."

The Poor Law (Ireland) Act, 1899 (62 & 63 Vict. c. 37), section 1, provides as follows:—

"Where a child is maintained by the guardians of a poor law union; and .... (ii) the guardians are of opinion, that by reason of mental deficiency, or of vicious habits or mode of life, a parent of the child is unfit to have the control of it, the guardians may at any time resolve that, until the child reaches the age of eighteen years, all the rights and powers of such parent as aforesaid, in respect of the child shall, subject as in this Act mentioned, vest in the guardians, and thereupon those rights and powers shall so vest accordingly and shall continue so vested whether the child does or does not continue to be maintained by the guardians." This section repealed sub-sections (1), (2), and (4) of section 1 of the Poor Law Act, 1889, which had given somewhat similar powers to the guardians in the case of children who were orphans or deserted by their parents.

Hanna, K.C., and *E. S. Murphy*, for the applicant:—

The guardians on the particular facts of this case had no power to detain the children, for the resolution of 10th November, 1911,

under which they purport to exercise parental control, has no operation under the Act of 1899, owing to there being no statement of the guardians to the effect that the mother was of vicious habits and unfit to have control of them. The resolution apparently purports to exercise the power of parental control conferred on the guardians by section 2 of the Poor Law Act, 1892; but under the proviso to section 2 of the Poor Law Act of 1892, when the parent ceases to be in receipt of indoor relief the guardians' control, even if antecedently well acquired, also ceases to exist. On these grounds the guardians had no power to detain the applicant's children.

A. M. Sullivan, K.C., and *J. M. FitzGerald*, for the Cootehill Board of Guardians:—

Under the statute of 1899 all that is necessary is that there actually exists a state of facts sufficient to justify the opinion on the part of the board of guardians, that the mother is unfit on account of her mode of life to have the control of these children, and that the guardians by resolution express their intention to assume control of them.

LORD O'BRIEN, L.C.J.:—

The guardians clearly have passed no resolution here within the meaning of sub-section (ii) of section 1 of the Poor Law (Ireland) Act, 1899.

MADDEN, J., concurred.

Order absolute.

Solicitor for Jane McGlynn: *Charles E. Murphy.*

Solicitors for Cootehill Board of Guardians: *Blood Smyth & Co.*

J. M.

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Nov. 19, 20, 21, 22, 25.

THE KING (REA AND OTHERS) v. WILLIAM DAVISON, A JUSTICE OF THE PEACE FOR THE COUNTY OF THE CITY OF BELFAST (1).

Justices — Jurisdiction — Indictable offence — Judicial act — Prohibition — Warrant to arrest — Right of district inspector to whom warrant addressed to select Justice to hear complaint — Prisoner produced at Petty Sessions — Justice who issued warrant refusing to act alone — Right of district inspector to select another Justice — Order of discharge — Bias — Application of Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), to cases of surety for the peace.

R. and S. were arrested on a charge of an indictable offence on warrants issued by N., a resident magistrate. The warrants were in the form given in the schedule to the Petty Sessions (Ireland) Act, 1851, and commanded M., the District Inspector of the Royal Irish Constabulary, to whom they were addressed, to bring the prisoners before N. or some other Justice. The prisoners when arrested were lodged in the police cells, and brought next morning into the dock of the Petty Sessions Court, N. being on the bench together with D. and seven other magistrates. The names of the prisoners and the offences with which they were charged had been entered in the Petty Sessions order-book, but without the authority of M. or the Crown Solicitor, and when produced in the dock their names were called from this book by the Clerk of the Court. Counsel for the Crown stated that he proposed to bring the prisoners before N. alone. N. ruled that the other Justices sitting with him were also seised of the cases. Crown counsel then directed the prisoners to be removed by the police, and this was done. The magistrates present, with the exception of N. and D., were of opinion that the prisoners should be discharged, but no formal poll was taken, and by the direction of N. an order was entered in the order-book: "No appearance for the complainant." During the course of the proceedings D. referred to the Bench being packed. He said to the prisoners' counsel "There are seven on your side." "You have seven magistrates to do as you like." The prisoners were subsequently brought by M. before D. alone, no formal notice of this being given to their solicitors. D. took the deposition of the constable who had arrested the prisoners, and then remanded them on bail. Neither their counsel nor solicitor was present. They applied for a writ of prohibition, prohibiting D. from further proceeding in the taking of depositions on the ground of bias and want of jurisdiction.

Held, that the function of magistrates in returning for trial is judicial, and prohibition will lie if bias or want of jurisdiction is established.

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

Held, by Palles, C.B., and Gibson, J., Boyd, J., dissenting, that there had been no valid order of discharge, and that D. had jurisdiction.

Held, by Gibson and Boyd, JJ., Palles, C.B., dissenting, that R. and S. were properly before the Court of Petty Sessions, and were illegally removed, and that that Court would have had jurisdiction to make an order.

Held, by Palles, C.B., and Gibson, J., Boyd, J., dissenting, that bias on the part of D. was not established.

Quære, is an application for sureties of the peace within the Petty Sessions Act?

The King (*Bransfield*) v. *Justices of Cork* ([1912] 2 I. R. 151) considered.

PROHIBITION.

This case was an application on behalf of the Crown and Mr. William Davison to discharge a conditional order for a writ of prohibition obtained by the prosecutors, directed to Mr. William Davison, prohibiting him from further proceeding in the taking of depositions against the prosecutors in respect of the charge of assaulting certain persons, thereby causing them actual bodily harm, on the grounds of bias and want of jurisdiction by reason of the proceedings and order previously had at Petty Sessions, and no preliminary initiation of the proceedings before the said William Davison.

The prosecutors herein, seven in number, had been arrested on the 11th of August, 1912, on the charge of assaulting one Thomas Maguire, thereby occasioning him actual bodily harm. They were committed by the Justices for trial before the Recorder of Belfast at the next Sessions. Application was made to the Recorder on the part of the Crown to have the prosecutors (and other persons charged with assault and riot) sent for trial to the Winter Assizes. The application was refused. Three prisoners (not including any of the prosecutors) were indicted and put on trial before the Recorder, and acquitted by the jury. *Nolle prosequis* were then entered by the Crown in the cases of the prosecutors, and they were discharged. On the same evening (the 1st November) they were again arrested on the same charges, on warrants signed by Mr. Nagle, Resident Magistrate (who had taken the previous depositions). These warrants were issued on informations sworn before Mr. Nagle, the informant being bound over to appear at Petty Sessions. The warrants were in the form B b in the Schedule to the Petty Sessions Act. They were headed "Petty

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Sessions District of Belfast," and required Mr. Milling, the District Inspector of the Royal Irish Constabulary, to whom they were addressed, to bring the prisoners before Mr. Nagle or some other Justice to answer the complaint. Mr. Milling endorsed the warrants to various constables by whom the several prosecutors herein were arrested and lodged in the police cells of the Central Police Station, Belfast. In accordance with the usual practice their names and the offences with which they were charged were entered in the charge-book, and this was sent to the Clerk of Petty Sessions, who entered the particulars in the Petty Sessions order-book. Such entry in the order-book was made without the direction or authority of the Crown Solicitor or District Inspector.

On the following morning (Saturday) Mr. Nagle came to the magistrates' room in the Police Court. He was asked by Mr. Gelston, the senior District Inspector, when he would take up these cases. He said, after the ordinary cases, and fixed 12.30 as the hour. He afterwards communicated this in Court to the prisoners' solicitors. Mr. Nagle and Mr. Davison then sat with some other magistrates, and heard the ordinary Petty Sessions cases, which were disposed of at 12 o'clock. At 12.30 Mr. Nagle took his seat on the Bench in the Custody Court, together with Mr. Davison and seven other magistrates. According to the rota arranged by the magistrates, Mr. Davison was one of the magistrates selected for attendance on Saturdays, and he had regularly attended. Only one of the other seven magistrates was on the rota for Saturday, and some of them had not attended Petty Sessions for a considerable time.

The names of Rea and Spence, two of the prosecutors herein, were called from the order-book by the Clerk of the Court, and they were brought to the bar of the dock. The other prosecutors were in a compartment at the back of the dock. Mr. M'Sweeny, K.C., of counsel for the Crown, applied to Mr. Nagle to take the cases alone, and stated that he did not propose to bring them before the other Justices. Mr. Nagle said it was a Petty Sessions Court, and Mr. M'Sweeny agreed. Mr. Nagle ruled that, having regard to the form of the warrant under section 11 of the Petty Sessions Act, and the procedure as laid down in section 14, the

Justices who were sitting with him when the prisoners were brought forward were seised of the case equally with him, as he had not taken any portion of the depositions alone. Mr. M'Sweeny then directed the police to remove the prisoners from the dock, and this was done, counsel for the prisoners objecting, and contending that the men having appeared in the dock, and their names appearing in the order-book and having been called, they were properly before the Court of Petty Sessions, and that the cases should either be proceeded with, or that the Court should order the prisoners to be discharged. Mr. M'Sweeny asked Mr. Nagle if he would allow the prisoners to be brought before himself alone. Mr. Nagle stated that he was of opinion he could not exclude the other Justices. Mr. Davison remarked that some of the magistrates had not been there for seven years. Mr. M'Sweeny stated that the Bench was packed to defeat justice. Mr. Davison also stated that the Bench was packed. The Crown counsel and Crown Solicitor then left the Court.

Mr. Tughan, the solicitor for Rea and Spence, in an affidavit made by him to ground the application for the conditional order for the writ of prohibition, stated that after the Crown counsel and Crown Solicitor had left the Court prisoners' counsel again objected to the prisoners being removed on the order of the Crown counsel, and demanded a poll of the magistrates; that Mr. Nagle then took the opinion of the Bench, and seven magistrates voted that an order should be made for the discharge of the prisoners, Mr. Nagle and Mr. Davison voting that the order should be marked "no appearance for the complainant." Mr. Nagle, in an affidavit made by him, and filed on behalf of the Crown, stated that he took no formal poll; that the majority of the magistrates seemed desirous of having the prisoners discharged, but that he refused to make any such order; that the cases were called over and marked by his direction "no appearance for the complainant"; and that this order was entered in the order-book, and signed by him, and no other order had been made in it. He further stated that had he been satisfied that he had exclusive jurisdiction he would have exercised it on the application of the Attorney-General.

When the prisoners' counsel demanded a poll of the magis-

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trates, Mr. Davison said: "There are seven on your side." "You have seven magistrates to do as you like."

After the cases had been marked "no appearance for the complainant," Mr. Nagle and Mr. Davison left the Bench. The magistrates remaining directed the police to bring back the prisoners, but this they refused to do, Mr. Gelston stating that he was acting under the order of the Crown Solicitor in so refusing. The magistrates then entered in the order-book that District Inspector Gelston, acting on the orders of the Crown Solicitor, refused to produce the prisoners. The magistrates then all left the Bench.

Subsequently, on the same day, the Crown Solicitor and Mr. Milling asked Mr. Davison to take the cases, and he agreed to do so at 3 o'clock. Mr. Milling arranged that the prisoners would be produced at that hour. No formal notice of this was given to the solicitors for the prisoners, but Mr. Milling casually mentioned the fact to the solicitor for some of the prisoners. At 3 o'clock the prisoners were brought before Mr. Davison. Their solicitors were not present. The evidence of the constables who arrested the several prisoners was taken. The Crown applied for a remand in each case, and this was granted. The prisoners in each case applied for bail, and this was granted, and they entered into recognizances with sureties to appear before Mr. Davison on the 7th November. On that day they appeared before him, their solicitors also attending. Mr. Davison proceeded to hear the cases until a telegram was received notifying that the conditional order herein had been granted. He then adjourned the cases, but did not admit the accused to bail, considering that he was precluded by the order.

Mr. Milling, in an affidavit made by him and filed on behalf of the Crown, stated that he gave no directions to have the names of the prisoners or the charges entered in the Petty Sessions book; that he did no act which was intended to give the Petty Sessions magistrates control over the cases; that his intention, according to his instructions, was to bring the prisoners before the resident magistrate alone; and that so far as any act of his was concerned, they were never brought by him for adjudication before any magistrate other than the resident magistrate.

Mr. Davison, in an affidavit made by him, stated that he was quite willing that Mr. Nagle should adjudicate alone, and had suggested to him that he should do so.

The Attorney-General (*The Right Hon. Ignatius O'Brien, K.C.*) (with him *The Solicitor-General* (*Molony, K.C.*), *M'Sweeny, K.C.*, and *Horan*), for the Crown and Mr. Davison:—

A Justice, in returning a prisoner for trial, is acting ministerially rather than judicially, and prohibition does not lie: *Cox* v. *Coleridge* (1). But assuming such act to be judicial, the writ of prohibition should not be granted in the present case. The warrant here directed the District Inspector to bring the prisoners before Mr. Nagle or some other Justice. The District Inspector, therefore, had the right to elect to bring the prisoners either before Mr. Nagle or some other Justice. He elected to bring them before Mr. Nagle, who therefore became solely seised of the case to the exclusion of the other Justices present: *The King* (*Bransfield*) v. *Justices of Cork* (2). The entry of the cases in the Petty Sessions book was merely for convenience. When an information in writing and on oath is made before a Justice, it is for him to determine whether he will issue a summons or a warrant. If he issues a summons, such summons fixes the time and place of hearing, and the hearing is to be "before such Justices as shall be there." If, however, he issues a warrant, neither time nor place is fixed. By determining on a warrant the Justice determines against the proceedings being at Petty Sessions. The position taken up all along by the Crown was, that the prisoners were produced, not before the Justices at Petty Sessions, but before Mr. Nagle alone. Mr. Nagle having refused, wrongfully, to act alone, the District Inspector had a right to select any other Justice, the prisoners being still in his custody. He subsequently selected Mr. Davison, who thereupon acquired exclusive jurisdiction.

Even assuming that when the prisoners were brought before Mr. Nagle he had not exclusive seisin, but that the other magistrates present had also jurisdiction, and that they had made a valid order for the discharge of the prisoners, so that the warrant was spent, this would not have

(1) 1 B. & C. 37. (2) [1912] 2 I. R. 151.

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deprived Mr. Davison of jurisdiction when the prisoners were subsequently brought before him by the District Inspector. A Justice has jurisdiction to hear, although the warrant on which the prisoner is brought before him is illegal, or although the prisoner is brought before him without a warrant: *The Queen* v. *Hughes* (1).

There is no evidence of bias on the part of Mr. Davison which would disqualify him from acting. To have this effect real bias must be shown, not mere possibility of bias: *The Queen* v. *Rand* (2); *The Queen* v. *Meyer* (3); *The Queen* v. *Farrant* (4). There must be a real likelihood of an operative prejudice, whether conscious or unconscious: *The King* (*de Vesci*) v. *Justices of King's Co.* (5), *per* Lord O'Brien, L.C.J.

Ronan, K.C., and *Henry, K.C.* (with them *Samuels, K.C.*, *Hanna, K.C.*, and *T. W. Brown*), for the prosecutors:—

In returning an accused person for trial Justices are acting judicially, not ministerially: *The Queen* v. *Justices of Roscommon* (6), *per* Sir Peter O'Brien, C.J. (p. 172), and Holmes, J. (p. 177); Stephen's History of Criminal Law, vol. i, pp. 228, 229.

The prosecutors are entitled to the writ of prohibition on the grounds mentioned in the conditional order.

First, by reason of the previous proceedings and order. Mr. Nagle himself fixed Petty Sessions as the tribunal for hearing the cases. The information bound the informant to attend at Belfast Petty Sessions, and was transmitted by Mr. Nagle to the Clerk of Petty Sessions, as required by 21 & 22 Vict. c. 100, sect. 8, subsect. 3. In the ordinary course the case would have come before the Court of Petty Sessions, and there was nothing here to interfere with the ordinary course. After the prisoners had been put in the dock, Mr. Nagle stated that the Court was a Court of Petty Sessions, and counsel for the Crown agreed. Mr. Nagle, so far from assuming sole seisin, refused to act without the other

(1) 4 Q. B. D. 614.
(2) L. R. 1 Q. B. 230.
(3) 1 Q. B. D. 173.
(4) 20 Q. B. D. 58.
(5) [1908] 2 I. R. 285, at p. 294.
(6) [1894] 2 I. R. 158.

magistrates. This distinguishes the present case from *The King* (*Bransfield*) v. *Justices of Cork* (1), which is also distinguishable on the ground that in that case the warrant, which was assumed to be valid, was to bring the prisoners before the Justices who issued it, omitting the words, "or some other Justice of the county." The warrant in the present case contains these words, being in the form prescribed by the Petty Sessions Act. The object of prescribing this form was to put an end to the right of a prosecutor to choose his own magistrate. Once the prisoners were brought before the nine magistrates at Petty Sessions, a *lis* was constituted, and neither the police nor the Attorney-General had any further authority over the prisoners until the matter had been determined by the Justices. Mr. Nagle was right in his ruling. The whole Bench of magistrates had seisin of the case, and jurisdiction having attached to them, this excluded the separate jurisdiction of Mr. Davison: *The King* v. *Sainsbury* (2). *The King* (*Bransfield*) v. *Justices of Cork* (1); Paley on Summary Convictions (8th ed.), p. 54. The majority of the Bench voted for the discharge of the prisoners. No special form of order being prescribed by statute in these cases, the opinion of the majority, clearly ascertained, is the judgment of the Court: *The King* (*Quinn*) v. *Chairman and Justices of Tyrone* (3), *per* Lord O'Brien, L.C.J.

Secondly: there is clear evidence of bias on the part of Mr. Davison. In the face of the ruling that all the Justices had seisin of the case, Mr. Davison proceeds to hear it by himself in a private room without notice to the defendants' solicitors. His statements that the Bench was packed, and that the prisoners' counsel had seven on his side, show that he had already made up his mind on the other side. The Crown selected a magistrate to hear the case who had already decided against the prisoners. "If an applicant for a licence, or a party in a civil proceeding to be heard before magistrates, or above all a prosecutor in a criminal case to be heard before a magistrate, goes to a magistrate and asks him to attend the Sessions for the hearing of that particular case,

(1) [1912] 2 I. R. 151.
(2) 4 T. R. 451.
(3) [1908] 2 I. R. 124, at p. 129.

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it is impossible the magistrate can come there without bias": *Rex* (*Malone*) v. *Tyrone Chairman and Justices* (1), *per* Palles, C.B. [They also referred to *Eckersley* v. *Mersey Docks and Harbour Board* (2); *The King* (*Taverner*) v. *Justices of Co. Tyrone* (3).]

The Solicitor-General, in reply :—

The circumstance that the information bound the informant to appear at Petty Sessions is immaterial. It is not until after the information is sworn that it becomes the duty of the Justice to determine whether he shall issue a summons to enforce appearance at Petty Sessions, or a warrant to bring the accused before himself or some other Justice. Mr. Milling had the custody and control of the prisoners from the time of their arrest. He had the right to determine before what Justice they should be brought, and to bring them before a single Justice. It was his volition which governed, and his volition was to bring the prisoners before Mr. Nagle alone. The fact that other Justices happened to be present did not constitute the Court a Court of Petty Sessions, or give such other Justices jurisdiction. The case is the same as if the prisoners had been brought before Mr. Nagle in his drawing-room, and there happened to be several other magistrates there. The entry in the Petty Sessions book cannot affect the matter. Mr. Milling had given no authority for such entry. Nor was there any power in any one to make the entry, since this was not a case of summary jurisdiction; and even if it had been, there is no power to make the entry until the case has been determined. The calling of the names of the prisoners by the Clerk of Petty Sessions is immaterial, since he was the officer to prepare the informations whether the hearing was at Petty Sessions or not. A warrant is not executed until the prisoner is brought before a magistrate ready and willing to hear the complaint. If Mr. Nagle had been willing to assume sole seisin, as it was his duty to do, the warrant would have been executed when the prisoners were brought before him. Mr. Nagle, however, having refused to act

(1) 3 New Ir. Jur. Rep. 177, at p. 183.

(2) [1894] 2 Q. B. 667.

(3) [1909] 2 I. R. 763.

unless the other magistrates were associated with him, the warrant remained unexecuted, and Mr. Milling was entitled to exercise the alternative given by the warrant to bring the prisoners before some other Justice. He selected Mr. Davison, who thereby acquired jurisdiction. There was no original jurisdiction in the nine magistrates to hear the case. Nothing was done by Mr. Milling to give them jurisdiction. But, even assuming that they had jurisdiction, no order for discharge of the prisoners was made by them. [He referred to 2 Hawk., P. C. 174; *The Queen* v. *Martin* (1).]

There was no evidence of bias on the part of Mr. Davison. He did not volunteer to act; on the contrary, he wished Mr. Nagle to act alone. It would have been a breach of his duty as a magistrate if when asked by the responsible officer of the Crown to hear the cases he had refused. The mere expression of strong views on a subject is not enough to constitute bias: *Ex parte Wilder* (2).

BOYD, J.:—

Nov. 25.

The prisoners in this case were, on the 11th of August, 1912, arrested, with others, on a charge of assaulting one Thomas Maguire, and thereby occasioning him actual bodily harm. On this charge they were brought up before the Justices at Petty Sessions at Belfast, and after two remands were committed for trial before the Recorder of Belfast at the Sessions which opened on 10th September, 1912. At these Sessions an application was made on the part of the Crown to the Recorder to have them sent for trial to the Winter Assizes. The Recorder refused this application, and the case was adjourned to the next Sessions on the 29th October, 1912. The Crown then again applied to have the case sent to the Winter Assizes, and the application was again refused. Three of the prisoners were tried at the said Sessions, and they were acquitted by the jury, whereupon counsel for the Crown entered a *nolle prosequi* in the remainder of the cases, and the prisoners were discharged from custody on the 1st November, 1912.

On the same evening they were again arrested on warrants

(1) I. R. 8 C. L. 556. (2) 66 J. P. 761.

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signed by Mr. Nagle, the Resident Magistrate. These warrants were on the Form B b in the schedule to the Petty Sessions (Ireland) Act, 1851, and required the District Inspector of Constabulary, who was the person to whom the warrant was issued, to bring the persons therein named "*before me or some other Justice of the County* to answer the said complaint." At the top of the warrant it is stated to be issued from and for the "Petty Sessions District of Belfast." Section 25 (1) of the Act enacts that all warrants in proceedings as to offences punishable either upon indictment or upon summary conviction which shall be issued in any Petty Sessions district shall be addressed to the sub-inspector or head constable of constabulary who shall act for *the place where the Petty Sessions for such district shall be held.*

In this case the prisoners, after their arrest, were brought to and lodged in the cells of the central police-station, and, in accordance with the invariable, and as I conceive very proper, practice, their names, descriptions, and offences with which they were charged were entered in the charge-book. For the convenient discharge of the business of the Justices sitting at Petty Sessions there is transcribed into the order-book the particulars entered in the charge-book. Both books are sent to the Clerk of Petty Sessions, who therefrom calls on the several cases which require to be heard at the Petty Sessions. That course was adopted in this case, and the prisoners were called, and put into the dock. I am of opinion that the magistrates sitting at the Petty Sessions then had complete seisin of the case, and it lay upon them to make an order therein according to the law.

For the purpose of securing the attendance of magistrates at the sittings of the Petty Sessions Court, which sits every week-day at 10.30 o'clock, there has been an arrangement amongst the Justices that they need not all attend each sitting, but that certain members of the body should be bound to attend on certain days, and that the others need not attend except on the days fixed for their attendance. According to this rota it was Mr. Davison's duty to attend on each Saturday, and he did so attend. The prisoners in this case and others were arrested on warrants, as I have stated, on Friday, the 1st November, and were brought before the Court on Saturday, the 2nd November.

It so happened that several other magistrates, seven in number, besides Mr. Davison, attended at or shortly after the sitting of the Court on that day. Whether they were attracted by the unusual circumstances under which the prisoners were re-arrested on warrants after *nolle prosequis* had been entered on the same charge against them, I know not. These gentlemen are well known, and are some of the most respectable and respected citizens of Belfast. I am not acquainted with any of them; but during my several visits to Belfast, when on circuit, I have heard of several of them being gentlemen of the highest integrity and position in that city, who would discharge any duties they would undertake without fear, favour, or affection.

Mr. Nagle, the Resident Magistrate, states in his affidavit that in the forenoon of the 2nd November Mr. Gelston, R.I.C., came into the room and asked him when he would take up the hearing of the cases in which Mr. M'Sweeney was concerned, and that he arranged to take them up at 12.30 p.m. This arrangement having been communicated in open Court to Mr. Graham, the solicitor who was retained by some of the prisoners, whom, for shortness, I will call the *nolle prosequi* prisoners, he left the Court, and some of the magistrates also left. At 12.30 Mr. Nagle states he proceeded to the Custody Court, and was followed on to the Bench by eight magistrates, including Mr. Davison, and they took their seats on the Bench. The names of Rea and Spence were called, and these prisoners were brought to the bar of the dock. Counsel for the Crown then applied to Mr. Nagle for him to take the case alone, and stated he (counsel) did not propose to bring them before the other Justices. Mr. Nagle states he ruled, having regard to the form of the warrant under section 11, and the procedure as laid down in section 14, the Justices who were sitting with him when the prisoners were brought forward were seised of the offence equally with him, as he had not taken any portion of the depositions alone. Mr. Nagle also states in his affidavit "the two prisoners were, *on the order* of the Crown counsel, removed from the dock," and that the Crown counsel and Crown Solicitor then left. He also states that, although he took no formal poll, the majority of the magistrates seemed desirous of having these and the other prisoners brought forward and discharged,

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but that he refused to make any such order, and that the cases were called over and marked by his direction, "No appearance for the complainant"; and that he subsequently signed the order-book. Mr. Milling, the District Inspector, R.I.C., states that it was under the orders of the Crown counsel, who stated, without a particle of evidence to support the statement, that several magistrates had assembled to defeat the ends of justice, he removed the prisoners from the dock.

I should like to know what right the Crown counsel had to give any such *order* for the removal and detention of the prisoners. In my judgment he had no right or power to make any such order, and the continued imprisonment of the prisoners under such order was unwarrantable and illegal. Mr. Moorhead states in his affidavit that it is not true, as sworn in Mr. Tughan's affidavit, that Mr. Nagle said he would not proceed without the other magistrates. This is a singular statement for Mr. Moorhead to make, having regard to the statement in his affidavit by Mr. Nagle himself. Mr. Tughan has also sworn that after the removal from the dock of the prisoners on the *order* of Crown counsel, Mr. Brown, counsel for the prisoners, demanded a poll of the magistrates, and that "Mr. Nagle then took the opinion of the Bench, and seven magistrates voted that an order should be made for the discharge of the prisoners," and that Mr. Nagle and Mr. Davison voted that the order should be marked "no appearance for complainant." There is no denial of this poll having been taken. Mr. Nagle only says he took no *formal* poll, whatever that means. Mr. Nagle and Mr. Davison seem to have usurped the authority to make the order as in the book.

Under the provisions of section 21 of the Act it was unnecessary to enter an order in the facts of this case. I am of opinion that the vote of the majority of the magistrates should not have been disregarded, and that the prisoners should have been discharged. I can find no case warranting such an order as that entered in the order-book. The only valid order the magistrates could have made was, "discharge," "remand," "commit for trial," or "admit to bail."

As to the question of bias, I am very decidedly of opinion

that Mr. Davison was disqualified from hearing or adjudicating in this case.

What are the facts which in my opinion disqualified him?

Mr. Davison was on the Bench on the 2nd November, and heard the point raised as to Mr. Nagle being entitled to sit alone and hear the cases, and after the arguments he heard Mr. Nagle rule as a matter of law he could not hear the cases in the absence of the Bench of magistrates, and I think he rightly so decided. Mr. Nagle, as Resident Magistrate, was in the position of guide to the Bench in matters of law and practice. Mr. Davison heard his brother magistrates require a vote to be taken after the prisoners had been taken out of Court, as to what order should be made by the Bench on the case, and in reply to an observation of one of the professional gentlemen concerned for some of the prisoners, stated—"You have seven magistrates *to do as you like*"; and when Mr. Brown, counsel for the prisoners, asked that a vote should be taken, Mr. Davison interposed with the observation—"There are seven on your side," by which he conveyed the opinion that he was on the other side. During the arguments he stated that the Bench was packed. After the case was over he was privately asked by Mr. Moorhead, the Crown Solicitor, to preside and hear the case alone, and he arranged to do so, although he was aware of the *ruling* of Mr. Nagle that he could not exclude the other magistrates. During the hearing of the evidence before him objections were frequently made to his assisting and making suggestions to the witnesses, and to his acting as third Crown counsel. In the face of this mass of evidence was he, in the language of Lord Esher, in the case of *Allinson* v. *The General Council of Medical Education and Registration* (1), a person who "must bear such a relation to the matter that he cannot reasonably be suspected of being biassed"? I think not.

I am of opinion that the whole proceedings in the case amounted to a travesty of justice, and that the cause shown should be disallowed with costs, and the conditional order should be made absolute.

(1) [1894] 1 Q. B., p. 759.

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GIBSON, J. :—

This was an application for prohibition on the ground of bias on the part of Mr. Davison, the magistrate taking the depositions, and want of jurisdiction by reason of the proceedings and order previously had at Petty Sessions. At the beginning of the argument the Attorney-General suggested that prohibition was inapplicable, as the proceedings were ministerial only, and he referred to *Cox* v. *Coleridge* (1) in support of that position. The *Roscommon Case* (2), however, having decided that the function of magistrates in returning for trial was judicial, the point was not adverted to by the Solicitor-General in reply; and I deal with the case as one where prohibition may be granted if bias or want of jurisdiction is established. It was not disputed that if the Petty Sessions Court had been competent to dispose of the case and had made an order, the action of Mr. Davison would have been a usurpation of jurisdiction to which *R.* v. *Sainsbury* (3) would have applied.

The application is based on facts of an exceptional character, arising from the accidental circumstance, not likely again to occur, of prisoners being brought forward before a Petty Sessions Court under arrest, and the prosecutor having then required that the magistrate who signed the warrant alone should act.

The substantial facts are not in controversy, and I shall give a brief summary of them deduced from my view of the evidence.

The jury having acquitted in one of several riot cases which the learned Recorder had refused to adjourn, the Attorney-General entered a *nolle prosequi*, in order, it would appear, to secure the change of venue made possible by the Winter Assize Order. An information was sworn on November 1st before Mr. Nagle, R.M. (who had taken the previous depositions), with a view to arrest the persons against whom the *nolle prosequi* had been entered, the informant being bound over to appear at Petty Sessions. The warrant was then issued in the usual Petty Sessions form to bring the parties before Mr. Nagle or some other Justice to answer the complaint. The prisoners were arrested and lodged in the police-

(1) 1 B. & C., at p. 50. (2) [1894] 2 I. R. 158.
(3) 4 T. R. 451.

cells in the usual way, and remained in custody of the police-officer till they would be disposed of in due course. Normally such cases are entered in the Petty Sessions book, and in the present case this course was followed; but such entry is only made for convenience, and does not represent any election by the arresting officer in regard to the mode of taking depositions. As to this I concur with the Solicitor-General, from whose able and lawyer-like argument and analysis of law and fact the Court has derived valuable assistance.

When he sat on November 2nd, Mr. Nagle was asked to fix a special hour for the cases to meet the convenience of counsel, and he appointed 12.30 o'clock, when it was supposed the ordinary Petty Sessions work would be over. At the first four cases four magistrates, Mr. Nagle, Mr. Davison, and two others, presided. Some twenty-six cases were then dealt with by Mr. Nagle and Mr. Davison alone. The ordinary business came to an end at 12 o'clock, and at 12.30 Mr. Nagle and Mr. Davison took their seats. They were followed by seven other magistrates. Mr. Davison was the proper Justice for the Saturday *rota*, and had attended regularly. Some of the seven magistrates had not been there before, and others only rarely. Mr. Davison's presence was unnecessary if Mr. Nagle had exclusive jurisdiction. The prisoners Rea and Spence were then called without objection, produced, and put in the dock. The other prisoners were never before the Court, being in a loose box behind the dock, where they could hear without being seen.

Mr. M'Sweeny proposed to take the case before Mr. Nagle, who said it was a Court of Petty Sessions, to which Mr. M'Sweeny assented. After argument, Mr. Nagle, referring to the form of warrant and section 14 of the Act, ruled that the other magistrates had the right to adjudicate, whereupon Crown counsel directed that the prisoners should be removed, and this direction was obeyed by the police. Mr. Brown, for the prisoners, applied that they should be discharged. Mr. M'Sweeny asked to have the cases heard in the magistrates' room; but Mr. Nagle replied he could not turn the magistrates out if they chose to come in. At this stage Mr. Davison interposed with the remark that some of the magistrates had not been there for seven years. Counsel

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emphasized this by saying that the Bench was packed to defeat justice. Mr. Davison expressed his agreement that the Bench was packed. Crown counsel and solicitor then left Court. Mr. Brown renewed his application for discharge, and the other cases were called. Mr. Nagle declined to make such order, and entered in the book "no appearance for the complainant," telling the seven magistrates, who then refused to adjourn, to make any order they liked. This entry was wrong, I think, and misleading. If the arrested men were properly before the Court, that Court was bound to deal with them whether the prosecutor appeared or not. The amazing situation was due, not to the non-appearance of the prosecutor, but to the forcible disappearance of the prisoners. On Mr. Nagle's ruling the action of the police was illegal. In the surprise of an unparalleled emergency it is not to be wondered at if Mr. Nagle made a mistake. The entry, though erroneous, shows that all the magistrates were recognized as forming the Court. Mr. Nagle and Mr. Davison left at 2 o'clock. The magistrates left behind requested the police to produce the prisoners; this they refused to do. No order of discharge was made, and the prisoners were left in Mr. Milling's custody under the original warrant. Mr. Davison was asked by the police, and agreed, to take the cases at the Central Police Court at 3 o'clock. Notice of this was in a casual way given to Mr. Osborne, a solicitor for some of the prisoners; but at the hearing at 3 o'clock, which was more or less formal, for the purpose of bail, the prisoners were not represented professionally. Mr. Davison having bailed the prisoners, adjourned the case to be heard before himself on November 7th. On the afternoon of that day the present conditional order was granted, and stopped further proceedings.

Mr. Nagle had taken the previous depositions; there could be no substantial objection to his performing the same duty again, and the intervention of the magistrates was unnecessary and likely to cause misconception and question. Whether they desired to make a demonstration by way of protest against imputations on the mode of administering justice in Belfast, or had some other reason, is not before us. Their conduct has been the subject of severe animadversion by counsel; but they are in no way before this Court, which cannot be influenced

by attacks on absent men who have no opportunity of explaining their conduct. From my experience of the administration of justice in Belfast, I should be unwilling to believe that, however strong the feelings of the magistrates may have been, they would have violated their duty if the evidence had been taken before them. I do not know any of these gentlemen; but if Mr. Davison, represented by counsel, feels keenly the charges made against him, possibly these gentlemen, unheard, may resent similar aspersions.

Three questions have been argued:—

1. Was there jurisdiction in the Justices to deal with the case (1) of Rea and Spence; (2) of the others?

2. What was the effect of no order having been made by the Justices?

3. Should bias be imputed to Mr. Davison?

No matter how the first question is decided, there was no order under section 15 of the Petty Sessions Act; without such order the legal custody under the warrant would not be changed; and even if the custody was illegal, there would be jurisdiction to proceed: *Reg.* v. *Hughes* (1).

As this first point has been fully argued, and as it enters to some extent into the consideration of the bias question, I will briefly discuss it.

1. Before the Petty Sessions Act, there were different forms of warrant. Sometimes, but rarely, the warrant was to be executed before the named Justice alone; most commonly before him or some other Justice; and not infrequently before him or some other Justice or Justices. On some occasions the warrant was made by two Justices: *Ex parte Aston* (2).

No time was fixed for the execution of the warrant: "The law has fixed a time, for by law the officer is bound to carry immediately before the magistrate. If he delay any time, it is against the duty of office": Parker, C.J., in *Reg.* v. *Derby* (3). Powis, J., in the same case said that where a warrant was to bring before a particular Justice, the officer might carry before another,

(1) 4 Q. B. D. 614.
(2) 12 M. & W. 456.
(3) Fortescue, at p. 143.

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if nearer. Unreasonable detention on the part of a constable or magistrate was actionable: *Wright* v. *Court* (1); *Davis* v. *Capper* (2). The constable, where the warrant was alternative, was entitled to select his Justice; though usually it would be proper to bring before the issuing Justice, the officer was not bound to do so: Hayes, p. 72. When the officer brought the person under arrest before the Justice, the warrant was executed; he had no voice in the composition of the tribunal. If two or more sat, that was a matter in which he had no concern. He was not a prosecutor, but merely a ministerial functionary. The power of election is founded mainly on convenience, in order to enable the arrested person to be dealt with as expeditiously as possible, in his interest, and not to enable the constable to exercise a *quasi* right of challenge. What would Coke, whose report of *Foster's Case* (3) is the primary authority on this point, have said to such pretension on the constable's part in the days of Shakespeare? What would have been the opinion of Powis, J., in such a case is certain from what he said: see *Reg.* v. *Derby* (4). The law is stated in Nun and Walsh, edition 1841, p. 185, as follows:—"The choice is not to be capriciously made, or such as to put the prisoner to any unnecessary inconvenience. The officer therefore will not be justified in carrying the prisoner to a distance when there is a magistrate near at hand; it is his duty, unless there be some very sufficient reason for not doing so, to proceed to the next Justice." *Wright* v. *Court* (1), a case of arrest without warrant, is explicit as to the principle. The judgment is as follows:—"But it is the duty of a person arresting anyone on suspicion of felony to take him before a Justice as soon as he reasonably can, and the law gives no authority even to a Justice to detain a person suspected, but for a reasonable time till he may be examined."

Where there was no warrant it was the duty of the arresting officer to take the prisoner with all convenient speed before some neighbouring Justice. 14 & 15 Vict. c. 92, s. 3, only states the common law rule. The principle controlling election and the

(1) 4 B. & C. 596.
(2) 10 B. & C. 28.
(3) 5 Co. 59.
(4) Fortescue, at p. 143.

duty of the officer are still governed by the common law, and are not altered by the Petty Sessions Act, or by the police being now servants of the State.

Under the Petty Sessions Act, the warrant in indictment and summary complaint cases is the same. In complaint cases, it is preceded by a summons: section 11, sub-sect. 2; and it is clear that the issue of a warrant does not, in such cases, vest in the Justice any exclusive right when the case is dealt with at Petty Sessions under section 8. The accident of arrest being the form of process does not alter the essential character of summary jurisdiction.

As to indictable offences, Mr. O'Connor correctly states, in his accurate treatise, p. 13, that the investigation usually takes place in open court at Petty Sessions, and sections 14, 15, and 19 contemplate such mode of hearing. Where, however, the accused is taken before a Justice, and the latter begins the investigation, he has exclusive jurisdiction. Had Mr. Nagle taken up this case alone, out of Petty Sessions, no one else could have interfered. The problem for solution arises from the prisoners having been brought before him at Petty Sessions, and his decision that the other Justices had the right to adjudicate. When the police produced the bodies before the Justices, they had performed their duty; they had no right to dictate how the Court should be composed and do its duty. There has been confusion in the argument between the duty of the arresting officer and the function of the prosecutor. Mr. Nagle, whether his view of law was right or wrong, acquiesced in the claim of the other Justices to sit with him. It must be taken that the Court was at this stage a Petty Sessions Court. The warrant is expressed in the singular for the benefit of the prisoner to enable him to be bailed or otherwise disposed of as soon as possible; if the presence of several Justices was required, this would have inevitably caused delay and prolongation of arrest. But whether one Justice is there or several, that is a matter over which the constable has no control. He, as ministerial officer, has no right to insist that the case shall be heard by one Justice and not several. That is for the Justices, not for him, to decide. Here Mr. Nagle declined to act alone, and the Justices were competent to deal with the prisoners

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brought into their presence. In my opinion, the warrant is exactly the same in effect as if it had the words "Justice or Justices."

Though it is unnecessary to decide it, I agree with Mr. Nagle that if prisoners are brought under arrest before a Petty Sessions Court, that Court is entitled to act. The prisoners so brought forward do not belong to any particular Justice. In a summary jurisdiction case on the same form of warrant all the Justices present could unquestionably adjudicate. This, however, does not at all involve that, where a magistrate is sitting alone, other Justices can troop in against his will and force themselves into the adjudication. In the present case, if Mr. Nagle had not been present, could the police have withdrawn the prisoners, because there was no single Justice who satisfied their requirements? Suppose that Davison had not chanced to be there, or that this was a case heard in the country, could the officer have detained the prisoners till he found a Justice of his choice? How long may such detention continue? Does the reasonableness of the time depend on his election? The form of the warrant does not confine jurisdiction to one Justice either at common law or under the Petty Sessions Act, which in sections 14, 15, and 19, recognizes the jurisdiction of a plurality of Justices. The duty of the constable is to bring up the prisoners at the earliest convenient time, and that duty cannot be postponed by the presence of several Justices. The point in the present case can hardly be of frequent occurrence, as arrested persons are not likely to be brought before a Petty Sessions Court, and then withdrawn.

I do not think that the words "to answer the complaint" in the warrant differentiate the case from a common law warrant; whether the complainant is there or not, the Justice or Justices must deal with the prisoners before them. Here the recognizance founding the arrest was for Petty Sessions, and, in any case, it was the duty of the Justices, being seised of the case, to inquire: O'Connor, Justice of the Peace, p. 50.

Bransfield's Case (1) was relied on. That case was on binding

(1) [1912] 2 I. R. 151.

over to the peace and was assumed to be outside the Petty Sessions Act. That was my opinion in *Mahony's Case* (1). The Exchequer Division, however, in *The Queen* v. *Barry* (2) decided that a peace complaint could be the subject of a case stated under the Summary Jurisdiction Act, 1857, and cases were stated on such complaints in *Lort* v. *Hutton* (3), and *Halpin* v. *Rice* (4). Hence in *Boylan's Case* (5), where the Solicitor-General strenuously argued to the contrary, I held that, having regard to section 34, peace complaints fell within the Act. *Bransfield's Case* (6) was not cited, and the Lord Chief Baron, although the point was argued, expressed no opinion on it. I do not think that *Bransfield's Case* (6) can be considered as a decision on the point. Even the House of Lords is not bound by decisions based on points assumed: *Kydd's Case* (7). Some day the matter may have to be settled. In peace complaints of all others, where the defendant cannot contradict the charge, public investigation would seem desirable. In good behaviour cases, Dalton recommended that two Justices should be present; and I believe that, since the Petty Sessions Act, procedure by summons has been adopted. Whether *Bransfield's Case* (6) is to be considered a decision on the point or not, it is certain that the jurisdiction was assumed to be governed by common law. The warrant there purported to reserve exclusive jurisdiction to the resident magistrate, and other Justices could not take part unless they were associated with him by the resident magistrate's voluntary act, or acquiesence showing consent. In the present case there was no exclusive right vested in Mr. Nagle; the officer could have gone to any other Justice, and Mr. Nagle assented to the other magistrates sitting. Whether he did so under mistake of law or not is immaterial. He declined exclusive jurisdiction, and the police had no authority to take away the prisoners and thereby prolong the period of arrest.

2. There was no order of discharge. Until the warrant was fully executed the custody remained in the police (8). As between

(1) [1910] 2 I. R. 695.
(2) 26 L. R. Ir. 40.
(3) 33 L. T. (N. S.) 730.
(4) [1901] 2 I. R. 593.
(5) [1912] 2 I. R. 374.
(6) [1912] 2 I. R. 151.
(7) [1908] A. C. 327.
(8) 2 Hale, P. C. 120.

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the Justices and the accused, the warrant was not fully executed until the Justices made an order discharging the prisoners or altering the custody under section 15. This, however, by no means decides that as between the prisoners and the police the custody was lawful. The existence of a warrant does not determine the question whether the arrest has not been unduly prolonged. But whether the detention of the accused was attributable to the omission of the Bench to make an order of discharge, or to wrongful compliance of the officer with unlawful directions, the jurisdiction of the magistrate at the inquiry is unaffected: *R.* v. *Hughes* (1).

3. The only remaining question is that of alleged bias. The law on the subject is well settled. The test is real likelihood of bias. Such bias may be often quite unconscious; the stronger the prejudice that a man entertains, the less likely may he be to suspect its existence. Again, a magistrate may be actually free from bias, but, by his conduct and language, he may have created a reasonable apprehension of partiality which in the interest of the pure and unsuspected administration of justice may disqualify him from acting.

Mr. Davison had for many years attended on the Saturday *rota* with exemplary diligence, and the duty which he was suddenly invited to perform in a perplexing situation was largely ministerial. Mr. Nagle, against whom no imputation could be made, had taken the previous depositions in the same cases. The new depositions would be probably reproductions of what had been previously sworn.

Mr. Davison was not, in my opinion, conscious of any bias, and was not in fact influenced by bias. The question, however, remains, had he, by his conduct and language, shown such a reasonable likelihood of partiality as would disqualify him? No case at all resembling the present has been cited. *Ex parte Robinson* (2) is quite unlike. The question is one of inference from facts on which authorities are of little assistance. The substantial grounds of impeachment are these four:—

(*a*) It is said that he acted unbecomingly in accepting a duty

(1) 4 Q. B. D. 614. (2) 28 T. L. R. 288.

which Mr. Nagle would have been the proper person to perform, but which he declined to accept. It would have been better, if possible, to have secured some independent magistrate unaffected by the controversy and heat generated by the earlier incidents of Saturday, but on consideration I think that Mr. Davison's action cannot be interpreted as reasonably indicating bias.

If Mr. Nagle was wrong in law, which is the Lord Chief Baron's view, this point fails. Even though there was jurisdiction to hear the case, and the action of the police was illegal, I cannot find as a fact that in acting as he did he showed bias. The jurisdiction question was one of difficulty; prompt action was necessary, as the prisoners ought not to be kept unnecessarily in custody. It was no doubt invidious to undertake a duty which the experienced resident magistrate had declined, but something had to be done by somebody. In asking him to sit Mr. Moorhead, Crown Solicitor, cannot be treated as having canvassed or sought favour, or made him a partisan in the interest of the prosecution. The case of *R.* v. *Tyrone Justices* (1) has no bearing on the facts here.

(*b*) Again, it is said that the imputations made by him more than once against his brother magistrates showed a state of mind and temper incompatible with impartiality. These imputations are regrettable; whatever he may have thought, he should not have attacked his companions in public in language which made it impossible for them, without admitting the charge, to desist from taking part in the cases. What was said, however, the result of temper in an excited atmosphere, and directed against the composition of the Bench, cannot fairly be construed as indicating a disposition to decide against the prisoners. His allegation of partiality against others does not prove partiality in himself.

(*c*) As to the absence of solicitors, informal notice had been given earlier in the day by the police officer to Mr. Osborne, solicitor for some of the prisoners; it was not part of the magistrate's duty to give such notice. There was no clandestinity to which he was a party. The proceeding was more or less routine, to prove arrest and admit to bail. He was not asked to adjourn.

(1) 3 New Ir. Jur. Rep. 177.

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I think the objection founded on the prisoners not being professionally represented at this stage is not substantiated.

(*d*) The last ground of alleged bias was the imputations made on the 7th, when the solicitors complained of Mr. Davison's conduct of the proceedings. Whatever he then did and said was no part of the foundation of the conditional order granted that afternoon. Taking the affidavits on this point as relevant, they only contain general imputations of favour and partisanship; no instance capable of disproof is given. The charges represent the opinion of advocates opposed to the magistrate's action. The dramatic incidents of Saturday would account for proneness to suspicion, and at the time the examinations of the 7th were going on, the solicitors doubtless knew that prohibition on the ground of bias was being applied for. The remark attributed to Mr. Davison: "the Crown will keep me right," in reply to an objection, coming as it did from a layman, is quite insufficient to establish partisanship.

On this branch of the case, though it may be that the prisoners and their advisers apprehend bias, I hold that no case of bias is made out, though my brother Boyd has come to a different conclusion.

I would add that Mr. Nagle, an experienced, able, and respected magistrate, acted with due regard to his judicial duty in deciding and acting on his own view of the law, and that nothing that he did in a situation of surpassing difficulty merits reproach or adverse criticism. If he erred in anything, as all fallible Judges may, his error was venial.

In my opinion, the cause shown must be allowed and the conditional order discharged.

PALLES, C.B.:—

This is an application for a writ of prohibition to restrain a Justice from continuing to take depositions in relation to charges against the prosecutors, and from returning them for trial. To sustain such an application it is necessary to show that the Justice is acting without jurisdiction.

The Attorney-General, for the Justice, insists that even if there

be a want of jurisdiction, we ought not to issue a prohibition, because, as he alleges, the proceeding before the Justice is not a *judicial* one, or that if it be of that nature it is one the decision in which cannot be examined by this Court upon *certiorari*; and in support of this contention he relies upon *Cox* v. *Coleridge* (1) and *The Queen* v. *The Justices of Roscommon* (2).

I cannot entertain any doubt that the proceeding is judicial and not ministerial. Indeed, it was held to be so in the *Roscommon Case* (2). The decision there was that, although the proceeding was a judicial one, and although the conclusion arrived at by the Justices was erroneous, a *certiorari* would not lie, as in making that erroneous decision they acted within their jurisdiction; and further (in the view of some members of the Court) that their order to return the depositions was not, and was not intended by the Petty Sessions Act to be, a recorded one. Such a decision is not in point in the present case, where the ground relied on is that the Justice is without jurisdiction to enter on the matter at all.

To show that there was absence of jurisdiction, the prosecutors have relied upon two, and upon only two, grounds:—

(1) That the jurisdiction to take the depositions had previously attached to the nine Justices who sat in Petty Sessions; and

(2) That the defendant was biassed.

The first ground was argued at much length; and some topics which I deem irrelevant were introduced on each side. I therefore desire, in the first instance, to clear away some matters before I come to the considerations upon which the answer to this first question depends.

There is absolutely no doubt that the learned Recorder was acting within his jurisdiction in refusing to send the trial of the cases to the Assizes, or to adjourn them; nor, on the other hand, can there be any doubt that it was within the discretion of the Attorney-General to enter a *nolle prosequi* against each of the untried prisoners. Into the mode in which the learned Recorder and the Attorney-General exercised their respective discretions I have no jurisdiction to enter. In determining, as I am, a strict question of the jurisdiction of another, it is right that I should be careful not to travel outside the limits of my own jurisdiction.

(1) 1 B. & C., at p. 50. (2) [1894] 2 I. R. 158.

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Again, it is absolutely clear that a *nolle prosequi* has not the force of an acquittal; and that the prosecutors here still remained liable to be proceeded against *de novo* by the Crown, in respect of the offences charged in the abandoned indictments. New proceedings, in such a case, are usually taken by sending up at the Assizes new bills of indictment against the incriminated persons, and, if such bills are found by the Grand Jury, by making the persons charged amenable for trial by arrest under Bench warrants issued by the Assize Court. Such has been the course of practice adopted during recent years in the many cases in which Justices refused to return for trial persons accused of cattle-driving; and such a practice is apt and sufficient when the then next Assize (the Assize at which it is proposed that the trial shall take place) is an ordinary one.

It is different when the next Assize is a Winter Assize, as under the Privy Council Order authorizing such an Assize the jurisdiction of the Assize is usually, and in the present case is, limited to the trial of prisoners who are either in custody or have been returned for trial—a class which would not have included the prosecutors here had they not been so returned.

Again, it is clear that, as the guilt of a person against whom, as here, a bill of indictment has been found remains undetermined when a *nolle prosequi* has been entered upon the bill, he may be re-arrested under a warrant issued by a Justice upon information sworn, and if the Justice so thinks fit may be re-committed for trial in respect of the offence mentioned in the abandoned indictment.

This latter procedure, although legal, is rather unusual. Many of the lay public may not be aware that it is legal, and may regard it as a hardship on the accused. It is, in great part, to this absence of knowledge that I attribute the conduct of the Justices the subject of discussion before us.

In result, then, the warrant of Mr. Nagle, issued on the 1st November, and the arrest of the prosecutors thereunder, were legal. On the morning of the 2nd November the prosecutors were lawfully in the custody of District Inspector Milling, and it was the duty of that officer to bring them before a Justice or Justices, within a reasonable time, for examination, with a view to their being

either — (1) committed for trial; (2) released on bail; or (3) discharged.

Now, as to the first ground of impeachment, I am so far in accord with Mr. Ronan's argument that I am of opinion that, if the nine Justices who sat in Petty Sessions on the 2nd November acquired jurisdiction to take the depositions against the prosecutors, then, *so long as their jurisdiction continued,* Mr. Davison was without jurisdiction to take such deposition *before himself alone*; but, on the other hand, I am of opinion that if, prior to the prosecutors being brought before Mr. Davison with a view to his taking such depositions, the jurisdiction of the nine Justices had ceased, the case would be different. In that event, as prisoners remain in the legal custody of the officer who arrests them until an order is made by a Justice either committing, bailing, or discharging them, the prosecutors here would have remained in Mr. Milling's custody, notwithstanding his having brought them before a competent Court; and if the jurisdiction of that Court had determined by reason of its having separated without an order, whether of adjournment, committal, or discharge, having been made by it, I cannot entertain any doubt that an obligation lay upon Mr. Milling again to bring the prisoners before a Justice, as otherwise their imprisonment might have continued during a period exceeding that which the law allows. These prisoners were entitled to be either returned for trial, admitted to bail, or discharged, within a reasonable time after arrest. Mr. Nagle declined jurisdiction, and as, upon the hypothesis upon which I am now proceeding, the jurisdiction of the nine had determined, the common law obligation of Mr. Milling could not be discharged unless he brought them *de novo* before a Justice, and the selection of the Justice would, in that event, have been in him.

Thus, there is involved in this first ground of impeachment the question not only whether the nine Justices had jurisdiction, but also whether they made any order in reference to these prisoners. I am of opinion (in accordance with what, until I heard the judgment of Boyd, J., I understood was the judgment of every member of the Court) that they did not make any such order. They declined, by a majority, to adjourn the Court. Some—I will assume all—of the Justices other than Mr. Nagle and Mr. Davison

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were of opinion that the prisoners should be discharged; but I am of opinion that they made no order to that effect, and that the entry made by the chairman as to the refusal of District Inspector Gelston to bring back the prisoners into Court was so made for the purpose of recording the reason why the Justices did not make any order.

The Justices then separated, without making any order for discharge, without giving any direction as to the custody of the prisoners, without even adjourning the taking of the depositions.

I am of opinion that the jurisdiction of the nine Justices (if it ever existed) thereupon determined, and that even if they had had previously jurisdiction to take the depositions, the fact of that antecedent, unexercised, and determined jurisdiction did not exclude or affect the jurisdiction and obligation of Mr. Davison to proceed, when called upon *de novo* to take the depositions.

I concur, then, in the opinion which, I understand, is held by my brother Mr. Justice Gibson, that the main question argued here does not arise; and consequently, although I have formed an opinion upon it, and one which, but for the doubts of my brother Gibson, would be a very strong one, I shall not make my opinion upon it any part of my *ratio decidendi*; but as the matter forms one of the grounds of the judgment of Mr. Justice Boyd, and has been so fully discussed in the judgment of Mr. Justice Gibson, I think it convenient to state shortly the grounds of my opinion upon it.

The common law on the subject is undoubted, and is thus stated in Sir Matthew Hale's Pleas of the Crown (1):—

"The warrant may issue to bring the party before the Justice that granted the warrant specially, and then the officer is bound to bring him before the same Justice; but if the warrant be to bring him before any Justice, then it is in the election of the officer to bring him before what Justice of the county he thinks fit, and not in the election of the prisoner: *Foster's Case* (2)."

In *The King* (*Bransfield*) v. *The Justices of Cork* (3), which was decided by the Lord Chief Justice, Mr. Justice Dodd, and myself,

(1) Hale's Pleas of the Crown, Wilson's ed., 1778, page 582.
(2) 5 Coke's Rep. 59 b. (3) [1912] 2 I. R. 151.

we had to apply this principle to the case of one Bransfield, who was arrested under a warrant issued by Mr. French, a Resident Magistrate, for his arrest, returnable before himself alone; which was granted upon an application that he should be required to give surety to keep the peace. Bransfield was arrested under the warrant, and whilst under such arrest was complainant in, and was examined as a witness in, a case at Petty Sessions. At the conclusion of the case in which he was complainant, Bransfield, being still in custody under the warrant, was in Court, and the case against him was taken up whilst not only Mr. French but the other Justices were on the Bench. The case previously determined at Petty Sessions, and the application against Bransfield for sureties, were so closely connected that all the Justices thought they were hearing the application for sureties. The question on an application for a *certiorari* was, in whom was the jurisdiction to hear the application; and we held that it was in Mr. French alone, and not in him and the other Justices.

It is true, as stated by my brother Gibson, that in that case the counsel on both sides assumed that an application for sureties was not within the Petty Sessions Act, and that therefore in such a case a warrant to bring the prisoner before the magistrate issuing it alone, without giving an option to the officer to bring him before any other Justice, was, as at the common law, valid, and the Court decided the case on that assumption; and, therefore, the case is not an authority on the question whether or not such an application is within the Petty Sessions Act. But it is an authority on the question which arises here, viz., whether when a prisoner is brought into a Petty Sessions Court upon a valid warrant the jurisdiction attaches to the person who would have had it had not other Justices been accidentally present, or to him and those other Justices. That case is binding on us here.

Now, the cases out of which the present question arises are not, as was that of Bransfield, applications for sureties. They are cases of indictable offences, in which the warrants are, and under sect. 11 of the Petty Sessions Act, must be, returnable before the Justices who issued them, "or any other Justice of the county." Under such a warrant, the officer (District Inspector Milling) admittedly had an election to take the prisoners either before Mr. Nagle, the

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Justice who issued it, or before any other Justice, or it may be before "other Justices" in the plural. The warrant is not to bring them before another Justice, failing Mr. Nagle; but the direction as to such other Justice or Justices is in the alternative, "or" *i.e.*, if not brought before Mr. Nagle. Mr. Milling, in my view, did not act upon this alternative. He acted on the first limb of the direction—"to bring him before me." Thus the election he had was not exercised.

I cannot distinguish in result between a case such as Bransfield's, in which no election existed, and one in which the election existed, but was not exercised; and my present opinion is that *Bransfield's Case* (1) binds us to hold that the jurisdiction to hear the case was in Mr. Nagle alone, and not in the nine Justices.

Even apart from *Bransfield's Case* (1), I should have been of the same opinion. The act of an officer in bringing a prisoner before a Justice not only confers a jurisdiction, but imposes a duty upon the Justice, and, whilst relieving the officer from part of his responsibility, imposes upon him a new duty, viz., to obey the legal order of the Justice in reference to the prisoner. An act which carries with it consequences such as these must be a human act, an act involving the officer's volition. He has to exercise an election. On the exercise of this election, a new duty arises in him. The nature of that duty depends upon the officer's own act. It cannot be—I say it with great deference—that the exercise of my election being "I bring this prisoner before you, A, in order that I may obey your lawful order"—it cannot be that, by reason of this my act, I am bound, not to obey the order of A, but to disobey it, and to obey that of seven others who happen to be accidentally present, and as to whom I did nothing. The contrary argument involves that the jurisdiction depends upon the locality to which, not upon the *person in that locality* to whom, the prisoner is brought. This is not the direction in the warrant, which is to bring the prisoner *before a person*, not to a particular locality.

It may be said, and it is true, that all I have mentioned may

(1) [1912] 2 I. R. 151.

follow from the act of the Justice, as the Justice may associate others with himself. But this association, which involves an extension of jurisdiction, is an act of the Justice, not the will of the officer. No doubt Mr. Nagle had jurisdiction (as I stated in *Bransfield's Case* (1) Mr. French had jurisdiction) to associate the other Justices with himself; but, had he done so, the consequences I have mentioned, so far as they would have arisen, would have arisen, not from the act of Milling, but from that of Nagle; and Milling should have had notice of that act, before any duty arose in him to dispose of the prisoners as directed by the nine, or the majority of them. Such new obligation and duty would not arise merely from the presence in the locality of the eight Justices, but upon that presence coupled with the request of Nagle (expressed or implied) to act with him, and upon the assent of the others to do so.

Although I mention this for the sake of clearness, I hold that no question as to it arises here. I implicitly believe the evidence of Mr. Nagle; and that evidence, to my mind, shows affirmatively that he did not associate any of the other Justices with himself. He was of opinion (an erroneous opinion, as I believe) that the other Justices, by reason of the law, and without any act of his, were associated with him, and it was in consequence of that erroneous belief that he stated he would not act in their absence.

The last question is whether the defendant was biassed. Upon this, I might content myself by stating that on this question I adopt the judgment of my brother Gibson, with which I am in entire accord. As, however, personal character is involved, I desire to add a few words.

Mr. Davison attended the Petty Sessions Court that day, being a Saturday, in accordance with a practice he had pursued with singular regularity since his appointment six years ago. He was one of the Justices on the *rota* for that day, on whom, by the agreement of the Justices, lay the duty to attend. I agree that the *rota* results from arrangement between the Justices, to ensure a constant attendance of lay Justices, and does not exclude

(1) [1912] 2 I. R. 151.

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the jurisdiction of any Justice not on it, to attend and act if he thinks fit. The *rota*, however, and his uniform attendance in pursuance of it, precludes the possibility of concluding that he came specially to hear the riot cases.

Mr. Ronan referred to an observation of mine, made in a case of *Rex* v. *Justices of Tyrone* (1), a licensing case. I there said, and I continue to be of opinion, that if an applicant for a license asks a Justice to attend the Sessions for the hearing of that particular case, and the Justice attends accordingly, it is impossible to say that that Justice can come there without bias. That is not this case. Mr. Davison came there not in reference to these particular cases, but in the discharge of his ordinary function and jurisdiction. So far from his desiring to hear these cases, he was the sole Justice who voted with Mr. Nagle on a division which in substance involved the question whether the cases should be heard by Mr. Nagle alone, or by the nine Justices; and his vote involved that Mr. Nagle alone should hear them. Whilst on the Bench, undoubtedly, he made two observations which I regard as unbecoming, and as an imputation that the seven other Justices were biassed. It is unfortunate that, in the clamour caused by the unusual circumstances of those seven Justices coming to hear those particular cases only, instead of the general Petty Sessions business, Mr. Davison should not only have drawn from that fact the inference which the Attorney-General's representative stated that he had drawn, but that he (Mr. Davison) should have permitted himself to state in Court the inference he had drawn. It does not appear to have occurred to him that the attendance of the seven magistrates to hear those cases only may have arisen from the unusual circumstance of depositions being about to be taken a second time, in relation to the same offences—offences on indictment for which a *nolle prosequi* had been entered. It might be that the seven Justices were honestly ignorant that such a proceeding, although unusual, was legal; and their object in coming may have been to ensure that in those unusual circumstances justice would be done. Whilst I must not be taken as expressing any opinion as to the conduct of those seven

(1) 3 N. I. J. R. 177, at p. 183.

Justices—it being unnecessary that I should do so—I cannot hold that a gentleman without legal training, who has not engrained in his mind, as we have, the maxim of *audi alteram partem*, evinces "a real likelihood of an operative prejudice" against persons charged, because he unwisely, and I will add improperly, states in Court the inference which I believe he honestly drew—an inference that had been previously insisted upon by a gentleman clothed with all the responsibility of specially representing the Attorney-General—an inference not derogatory to the prisoners, or which could affect the question whether they should be returned for trial. This circumstance distinguishes this case from *Ex parte Robinson* (1), as to which I shall hereafter say a word.

Mr. Davison appears to have acted, in reference to the legal question as to the jurisdiction of the Justices other than Mr. Nagle, upon the statement in open Court of the representative of the Attorney-General, although contrary to that of my respected friend Mr. Nagle; and accordingly, when the other Justices left, he consented, on the application of the Crown Solicitor, to take the depositions. In my opinion, he was bound to do so. It was the bounden duty of the Crown Solicitor to bring the prisoners before *some* magistrate that evening. I think that when the Resident Magistrate declined jurisdiction, the magistrate on the *rota*, who had attended during the entire of the Petty Sessions that day, was the Justice who it was most fit should be asked to do so; and had the opinion of the representative of the Attorney-General been correct—as in my opinion it was—the refusal of Mr. Davison to act would have subjected him to an indictment.

When the Crown Solicitor came to him, that Crown Solicitor, as an officer of the Crown, had an obligation cast upon him to see that a prisoner should not be kept in custody for an undue period of time. My observation in *Rex* v. *The Justices of Tyrone* (2) can have no application to such a case. If these prisoners had been kept in custody until Monday, serious injury would have been inflicted on them, and the officer in whose custody they remained might be liable to an action. I hold that it was the Crown Solicitor's duty to see that they were brought before a

(1) 28 Times L. R. 288. (2) 3 N. I. J. R. 177, at p. 183.

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magistrate at the earliest moment, and I wish to repeat that, in my opinion, Mr. Davison did nothing but his duty.

I cannot regard as evidence of bias in the Justice the omission of the Crown Solicitor to give notice to the solicitors for the prosecutors. If there was default in that respect, it was not that of the Justice.

As to the cases cited, cases are of little assistance upon a question of this class, which must be decided on broad, well-known, general principles. I shall therefore refer to one only of them—that of *Ex parte Robinson* (1), cited by Mr. Henry. In that case the statement in the letter written by the incriminated Justice, read in the sense in which the Court held it should be read, was that if he had voted for the license he would have been nothing less than a traitor to his position of secretary of a branch of the "Independent Rechabites," a Temperance Society which was opposed to the granting of all licenses. A more express statement that he could not consider the application for a license impartially it would be difficult to imagine. The difference of opinion amongst the Judges there was as to whether it was in this sense that the statement should be understood.

I have considered with the utmost care every circumstance urged by the counsel for the prosecutors; and I have arrived at the clear conclusion that the conduct of Mr. Davison in the case was actuated solely by the desire to do his duty, although in a moment of irritation he permitted himself to use the unbecoming expressions to which I have referred. We are all human. We cannot judge in a case of this kind by a standard which even paragons of perfection never reach. The opinion I have arrived at is one which, I think, would have been that of any reasonable member of the public who knew and considered all the facts.

For these reasons I agree with Mr. Justice Gibson that the application for the prohibition should be refused.

Solicitors for the prosecutors: *Nathaniel Tughan, John Graham,* and *John S. Osborne.*

Solicitor for the Crown and William Davison: *Sir Malachy Kelly.*

J. G. T.

(1) 28 Times L. R. 288.

THE KING (COURTNEY) *v.* EDWARD EMERSON, A JUSTICE OF THE PEACE FOR THE COUNTY OF THE CITY OF BELFAST (1).

K. B. Div. 1912. Nov. 25, 26.

Justices—Indictable offence—Bias—Prohibition—Right to give costs against Crown.

C. was arrested on a warrant charged with an indictable offence, and brought before E., a Justice of the Peace for the county of the city of Belfast, who had been asked by the Crown Solicitor to take the depositions. E. sat in a room in the police-station, and on the request of the Crown Solicitor made an order excluding all persons except representatives of the accused. Several other Justices for the county of the city of Belfast endeavoured to enter the room, but were refused admission. C.'s solicitor applied to E. to admit the other magistrates, but E. refused to do so, giving as a reason that he was guided by the Crown, and directed by the Crown not to allow the other magistrates to be present. C. having applied for a writ of prohibition to prohibit E. from proceeding further in the matter, on the ground of bias:—

Held, while entirely acquitting E. of any moral blame, that a reasonable public might think that the expression used by E. implied that in making his order he was acting by the direction of the Crown and not exercising his own discretion, and that the writ of prohibition should be granted.

The case had been taken up by the Crown on behalf of E.

Held, that there was no power to give costs against the Crown.

THE prosecutor herein, William Courtney, was arrested on the 28th July, 1912, and returned for trial before the Recorder of Belfast, on a charge of assault occasioning bodily harm to William M'Ilroy. A true bill was found by the Grand Jury. A number of other persons had also been returned for trial before the Recorder on charges of assaults. The Crown Solicitor, on instructions from the Attorney-General, applied to the Recorder to have all the cases transferred to the Assizes. This application was refused. Three prisoners (not including Courtney) were tried before the Recorder, and were acquitted. The next morning *nolle prosequis* were entered by the Crown in all the remaining cases, including that of Courtney. On the evening of the same day

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

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(1st November, 1912) a fresh information was sworn against Courtney, and a warrant for his arrest issued by Mr. Garrett Nagle, resident magistrate. The warrant was in the ordinary Petty Sessions form to bring the party before Mr. Nagle or some other Justice of the county of the city of Belfast. Courtney was arrested on the 4th November at 9.30 a.m., and lodged in the cells at the police-station, Belfast. He was not brought before the ordinary Petty Sessions Court held that morning, but was brought in the afternoon before Mr. Emerson, a Justice of the Peace for the county of the city of Belfast, who had been asked by the Crown Solicitor to take the depositions in the case. Mr. Emerson sat in the head constable's room in the police-station. On the application of the Crown Solicitor he made an order excluding all persons, except the legal representatives of the accused, the witnesses, and the Press. Several other Justices for the county of the city of Belfast endeavoured to enter the room, but were refused admission by a head constable, who stated that he was acting under the instructions of the Crown Solicitor. Courtney's solicitor applied to Mr. Emerson to admit the other magistrates, but Mr. Emerson declined to do so, giving as his reason that he was guided by the Crown, and directed by the Crown not to allow the other magistrates to be present. Courtney's solicitor protested and left the room. Mr. Emerson then took the deposition of the constable who arrested Courtney, and granted a remand till the following Thursday, Courtney being admitted to bail.

The prosecutor obtained a conditional order for a writ of prohibition, prohibiting Mr. Emerson from further proceeding in the taking of depositions against the prosecutor in respect of the charge, on the grounds of "bias, and unlawfully excluding other Justices having jurisdiction to deal with the case."

Mr. Emerson, in an affdavit made by him and filed on behalf of the Crown and himself by way of cause against making the conditional order absolute, stated that it was untrue that in making the order to exclude all persons other than those above mentioned he acted under orders from the Crown. He stated that he exercised his discretion upon the application of the Crown, and granted the application after he had been convinced by reference to the

statutes that he had power to do so, and that in this he acted solely in the interests of justice, and without any prejudice against the accused, who was unknown to him. That in making the orders he did he acted entirely upon the evidence and arguments before him and with a sole desire to execute impartially and according to law the duties of his office as a Justice of the Peace.

The present application was on behalf of the Crown and Mr. Emerson to discharge the conditional order and allow the cause shown against it.

The Attorney-General (*The Rt. Hon. Ignatius O'Brien, K.C.*) (with him *The Solicitor-General* (*Molony, K.C.*), *M'Sweeny, K.C.*, and *Horan*) for the Crown and Mr. Emerson :—

The present case is covered by the decision in *The King* (*Rea*) v. *Davison* (1).

Ronan, K.C., and *Samuels, K.C.* (with them *Henry, K.C.*, *Hanna, K.C.*, and *T. W. Brown*), for the prosecutor :—

When we find a magistrate openly stating that he is acting upon the directions of the Crown, that is to say of one of the parties to the litigation, it is impossible to say that there is not bias. The view likely to be taken by reasonable people must be taken into account.

The Solicitor-General, in reply :—

Mr. Emerson was entitled to hear the view put forward by the Crown as to the law and the statutes. His statement does not imply anything more than that having heard this view he adopted it, and acceded to the application of the Crown to make the order of exclusion.

PALLES, C.B. :—

We entirely acquit Mr. Emerson of any moral blame, or of doing anything consciously wrong. If we ourselves were the persons, or, at least, if I myself were the person, to construe these words, I should not grant the prohibition. But it is now

(1) *Supra*, p. 342.

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well settled that if the words used are such that a reasonable public, who are not lawyers nor acquainted with the strict rules of law, might reasonably hold that they indicated bias on the part of the magistrate, then there ought to be a prohibition. Here I cannot say that this reasonable public, unacquainted with the strict rules of law, could not think that the expressions used by this gentleman imply that in making his order he was acting by the direction of the Crown, and not exercising his own discretion. In these circumstances, I think that we ought to grant the prohibition.

We will hear the question of costs argued to-morrow.

GIBSON and BOYD, JJ., concurred.

Nov. 26.

PALLES, C.B.:—

On looking into the cases we think that there is nothing to be argued as to the question of costs. Having regard to a long line of authorities, *The Queen* v. *Beadle* (1); *Secretary of War* v. *Booth* (2); *In re Madden's Estate* (3); *The King* v. *Herron and Montgomery* (4), and *The King (Postmaster-General)* v. *Great Northern Railway Co.* (5), we cannot give costs against the Crown. But our impression is that when the Crown takes up the case of a private individual, it ought to indemnify him against costs. We propose, therefore, to follow the course we adopted in *The King (Jackson)* v. *County Council of Cork* (6). We shall direct Mr. Emerson to pay the costs, leaving him to settle the matter with the Crown; and we wish it to be distinctly understood that we think it eminently just that the Crown should indemnify Mr. Emerson against these costs.

Solicitor for the Crown and Edward Emerson: *Sir Malachy Kelly.*

Solicitor for the prosecutor: *John Graham.*

J. G. T.

(1) 7 E. & B. 92.
(2) [1901] 2 I. R. 692.
(3) [1902] 1 I. R. 63.
(4) [1903] 2 I. R. 474.
(5) [1908] 2 I. R. 32.
(6) [1911] 2 I. R. 206.

MARTIN MILLS (DEFENDANT), APPELLANT; GEORGE J. HOEY (COMPLAINANT), RESPONDENT (1).

K. B. Div. 1913. May 14.

Summary jurisdiction—Ejectment of small tenements—Summons by one joint owner—Summary Jurisdiction Act, 1851 (14 & 15 *Vict. c.* 92), *section* 15.

Where a small tenement, which is within the terms of section 15 of the Summary Jurisdiction Act, 1851, is owned by joint owners, a summons under the above-named section against the tenant to recover possession of the premises cannot be sustained if it is in the name of one joint owner merely who sues as owner.

CASE STATED.

George G. Hoey brought a summons against the appellant, Martin Mills, for "that he neglected or refused to quit and deliver up to the complainant, on due termination of the defendant's tenancy by legal notice to quit, possession of a certain house and premises in Bridge Lane, Tullamore, held by the defendant from complainant, the owner thereof, as a weekly tenant at a rent of 2*s.* 3*d.* per week." The case was heard at the Tullamore Petty Sessions, on the 22nd day of February, 1913, when the Justices made the following order:—"Defendant to be ejected from said house and premises, in not less than seven or more than ten clear days from this date."

In pursuance of an application made by the defendant, the Justices stated a case for the opinion of the King's Bench Division. The following are the material parts of the case stated:—

The following facts were admitted at the Petty Sessions—(*a*) that no demand for possession had been made following service of notice to quit; (*b*) that the summons was duly served upon the said defendant; (*c*) that the tenancy in the said premises was a weekly tenancy at a rent of 2*s.* 3*d.* per week, and that they are situate in the town of Tullamore, King's County, a place where

(1) Before GIBSON and KENNY, JJ.

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fairs and markets are usually held; (*d*) that the complainant is a solicitor, and is a partner in the firm of Messrs Hoey & Denning, solicitors, who signed the notice to quit.

The following facts were proved: (*a*) that a notice to quit was served on defendant by leaving a copy at his residence with his wife on the 17th January, 1913: this notice was in the usual form, and was entitled—"Notice to quit, under 14 & 15 Vict. c. 92," and was signed, "Hoey & Denning"; (*b*) that the defendant paid rent for the said premises to the said complainant, and that same was paid through the rent-collector of the firm of Messrs. Hoey & Denning, solicitors. Mr. Brennan, solicitor for the complainant, contended that the defendant, having paid rent to the said complainant as owner of said premises, was estopped from questioning the title of the said complainant, and quoted *Cooke* v. *Loxley* (1); *Syllivan* v. *Stradling* (2); *Dolby* v. *Iles* (3); *Panton* v. *Jones* (4). Mr. Rogers, solicitor for the defendant, argued—1st, that no valid notice on which the summons should be maintained had been served; 2nd, that the notice to quit had been served by and in the name of Hoey & Denning as owners, and without any reference whatever to the complainant; 3rd, that possession of the said premises should have been demanded before the summons was issued; 4th, that the complainant's title (if any) should be proved, since it accrued subsequent to the creation of the tenancy, which commenced about 1902, when defendant took the premises from Messrs. Hoey & Denning as agents for the representative of one Patrick Walsh; 5th, that there had been no change in the relations between the parties since, and that no rent had ever been paid except to Messrs. Hoey & Denning, as agents for the representative of Patrick Walsh, deceased. No evidence was given in support of the fourth and fifth contentions of the defendant's solicitor.

Shannon (with him *James O'Connor, K.C.*), for appellant:—

The action could not be sustained by Hoey, because, even assuming Hoey & Denning to be the defendant's landlords, they

(1) 5 T. R. 4.
(2) 2 Wils. 208.
(3) 11 Ad. & E. 335.
(4) 3 Camp. 372.

are joint owners, and Hoey could not sue in his own name alone; if Hoey is owner and entitled to bring an ejectment action against defendant, he must prove his title to enable him to get the ejectment order; there should have been a demand of possession before issue of the summons.

[GIBSON, J., referred to Cole on Ejectment, p. 286.]

Denning, for respondent:—

One joint tenant can maintain an action of ejectment. Under section 15 of the Summary Jurisdiction Act, 1851, an agent of the owners can bring an action. On the findings Hoey received the rent as agent, and on the construction of this section an agent can bring the summons for ejectment, and the magistrates can make an order for possession in favour of the agent. We submit that on the form of the section the person who can bring the summons is the same person as the person to whom the order for possession can be given; that is what the magistrates have done in this case.

[Counsel referred to *Murphy* v. *Grady* (1); *King* (*Walsh*) v. *Swift* (2); O'Connor's Justice of the Peace, p. 987.]

GIBSON, J.:—

The solicitors, Hoey and Denning, without title in themselves, having made a letting to defendant, duly determined same by notice to quit, jointly signed by them, the defendant being estopped from disputing their right to possession. A summons was taken out to recover possession under the Summary Jurisdiction Act, 1851, c. 92, section 15, in the name of George J. Hoey, as owner.

Treating Messrs. Hoey & Denning as joint owners, though one could sign an effectual notice to quit, both should have joined in the ejectment, and the summons was, therefore, insufficient: see authorities cited in Cole on Ejectment, p. 286. This disposes of the case.

There may be another point, whether the words in the section being "neglected of refused," relating to delivery or possession to

(1) [1904] 2 I. R. 591. (2) [1913] 2 I. R. 113.

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a particular person, a demand and refusal were not essential as part of the plaintiff's proof, particularly where, as here, the alleged neglect was not omission to give up to the joint owners, but to one of them. The point does not require decision, but my inclination would be in defendant's favour.

A further point was made by Mr. Denning that Mr. Hoey was agent, and as such could maintain the summons. That, however, is not the frame of the summons, and the point does not, therefore, arise. Whether, if the summons had been in that form, Mr. Hoey would have been within the section, is a matter not within the decision in *Swifte's Case* (1). If that section would enable an agent to recover in his own name, here Mr. Hoey was half an agent; for himself he was principal, not agent. The plaintiff fails on the first ground, that the summons is by him as owner, and, there being two owners, the complaint is in form erroneous. I need not discuss the matter further.

KENNY, J., concurred.

Solicitor for appellant (defendant): *James Rogers.*
Solicitors for respondent (complainant): *Hoey & Denning.*

J. M.

(1) [1913] 2 I. R. 113.

KELLY, APPLICANT; OWNERS OF SHIP "MISS EVANS," RESPONDENTS (1).

Appeal.
1913.
April 23.

Workmen's Compenstion Act, 1906, *section* 13—*Contract of service—Owner and master of ship—Crew.*

The owners of a small coasting schooner, by written agreement, gave command thereof to K. on the following conditions:—K. was to work the vessel on the best paying trade for the benefit of all concerned, receiving for his services two-thirds of all freights carried, out of which he was to pay all crews' wages, victuals of crew, port-charges, towages, and all other expenses connected with working the vessel; the remaining one-third K. thereby agreed to remit to the owners as "owners' share." If K. had cause to give up command, and so advised the owner, and if requested, K. was to bring the vessel to A. free of charge. While K. was working the vessel under this agreement one of the crew whom he had engaged met with an accident, for which he claimed compensation against the owners under the Workmen's Compensation Act, 1906.

Held, that, on the true construction of the agreement, K. was acting merely as agent for the owners in hiring the crew, and that the relation of master and servant, within the meaning of the Act, existed between the applicant and the owners.

APPEAL by the employers from the award at the Wicklow Hilary Sessions, 1913, of His Honour Judge Brereton Barry, K.C. The accident took place on board the schooner "Miss Evans," of which the employers were the registered owners, and Patrick Kinsella was master.

The only question was, whether, upon the true construction of an agreement in writing, made between Richard Jones, agent for the owners, and Kinsella, the crew, of whom the applicant was one, were servants of the owners of the ship, or of Kinsella. The agreement was as follows:—

"Connah Quay,
"*November*, 1909.

"AN AGREEMENT made this day between Richard Jones, Graianfryn, Amlwch Port, in the county of Anglesey, and P. Kinsella, Castle Street, Wicklow, Ireland, as follows:—

"That the said Richard Jones gives command of the schooner

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

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'Miss Evans,' now lying at Connah's Quay, to the said P. Kinsella on the following conditions, viz.:—The said P. Kinsella to work the vessel on the best paying trade for the benefit of all concerned, receiving for his services *two-thirds* of all freights carried, out of which he is responsible, and agrees to pay, all crew's wages, victuals of crew, port-charges, towages, and all and every other expenses connected with the working of the vessel; the remaining *one-third* he agrees to remit to the said Richard Jones as owners' share.

"Gratuity up to one guinea to be for the master; if above, to be divided as freight.

"If at any time the said P. Kinsella has cause to give up command of the said vessel, he hereby agrees to advise the said Richard Jones, and, if requested, the said P. Kinsella is to bring the vessel to Amlwch Port or the Menai Straits free of all charges to the owner, but if the said P. Kinsella advises his intention to leave from a loading port, and that port within a reasonable distance, the said Richard Jones has the option to send a person to take charge of the vessel at that port.

"And, further, it is agreed that the appointment is made on condition that the said P. Kinsella can only remain as long as he keeps total abstainer from alcoholic drink.

"Witness to the signatures of
"P. Kinsella and Richard Jones

"THOMAS JONES.

PATRICK KINSELLA,
RICHARD JONES."

6d Stamp.

Hanna, K.C., and *F. FitzGibbon*, for the appellants:—

The whole question here turns on the agreement between the owners and the master. We say that its effect was a letting of the ship to the master; and that the liability for the accident attaches to him and not to the owners: see *per* Cockburn, C.J., in *Sandeman* v. *Scurr* (1); Scrutton on Charter Parties, 6th ed., p. 3: *Baumvoll Manufactur von Scheibler* v. *Gilchrest and Co.* (2). Registration as owners does not affect the liability. The sharing system here further negatives any liability on the owners:

(1) L. R. 2 Q. B. 86, at p. 96. (2) [1892] 1 Q. B. 253.

Boon v. *Quance* (No. 1) (1)—a case which in its facts closely resembles the present. Here Kinsella got complete dominion over the ship. He engaged the crew and paid them, and he alone could dismiss them or any of them. The crew were clearly servants of Kinsella.

D. G. Chaytor, K.C. (with him, *E. A. Swayne*), for the applicant, Michael Kelly :—

There are at least three answers to the appeal.

(1) The question is purely one of fact, and the finding of the County Court Judge is conclusive: *Smith* v. *General Motor Cab Co.* (2); *Barlow* v. *Owners Ship "Victoria"* (3).

(2) If this Court can review the decision, there is ample evidence to sustain same. First, the agreement between the owner and captain as to the sailing of the ship is, on its face, merely a contract of service, and in no wise a charter-party, or anything in the nature of a demise of the ship. See in particular the provisions in the agreement as to remunerating the captain "for his services," and the power to terminate the contract for drunkenness.

The fact that the captain had the power to engage the crew does not affect the question. The same element existed in *Barlow's Case* (3).

Boon v. *Quance* (No. 1) (1) does not assist the appellant, as the Court of Appeal expressly left the point now involved open for future discussion. The point was involved in *Cobbledick* v. *Quance* (4), but the case was settled. *Jones* v. "*Alice and Eliza*" (5) is in our favour.

The ship was registered in the name of the owners, and not the captain.

If there had been a complete parting with the ownership of the ship, the transfer should have been registered as a bill of sale under sections 24 and 26 of the Merchant Shipping Act, 1894. See also section 59 of the same Act.

(1) 3 Butterworth, 106.
(2) [1911] A. C. 188.
(3) 45 I. L. T. R. 260.
(4) 3 Butterworth, 109.
(5) *Ibid.*, 495.

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(3) But in any event the owners are estopped by their conduct from now contending that the captain was owner, as they held him out as in their service, and cannot, at any rate as against third parties, now say he was not: Bowstead on Agency, last ed., p. 302; *Steel* v. *Lester* (1), a case of negligence; *The Great Eastern* (2); *Frazer* v. *Cuthbertson* (3); *Manchester Trust* v. *Furness* (4).

O'BRIEN, L.C.:—

The present case turns altogether on the terms of the written agreement between the owners of the ship and the captain.

Two persons named Owen and Morgan were the owners of a small ship called "The Miss Evans," which was used as a coasting vessel. In November, 1909, Patrick Kinsella was given the command of the vessel by Richard Jones, acting on behalf of the owners. Now, if there was nothing more in the case than the fact that Kinsella was appointed captain, the ordinary law would apply, and the relation of master and servant would exist between the seamen he employed and the owners. Keeping that position in mind, is it altered by the agreement? It is said that the document amounts to a demise of the vessel. Of course, to constitute a demise, no special form is necessary. But here we start with the statement that Richard Jones as manager for the owners gives command of the vessel to Kinsella. When the captain is appointed, what is he to do? He does not become lessee. He is to work the vessel "on the best paying trade for the benefit of all concerned." It is very difficult to put on these words any construction consistent with the hypothesis that Kinsella was a lessee. While working as captain for the benefit of all concerned he would have to employ a crew. Then what is he to get for acting for the benefit of all concerned? Remuneration. No doubt that remuneration does not take the form of so much per month, or per week, but the way in which it is to be paid does not alter the relation between the parties. He is to receive for his services two-thirds of all freights, and he is to defray certain outgoings which would otherwise be payable

(1) 3 C. P. D. 121.
(2) L. R. 2 Ad. 88.
(3) 6 Q. B. D. 93.
(4) [1895] 2 Q. B. 539.

by the owners. I do not see how anything in the agreement alters what would otherwise be admittedly his legal position—agent of the owners. *Boon* v. *Quance* (1) was cited; but that case only decided that the relation of master and servant did not exist between the owner and the captain of the ship, and there was no question as to the relation between the owner and the crew.

It is perfectly clear to me that here Kinsella held himself out to be, and was in fact, the agent of the owners in providing the hands to work the vessel, and that the relation of master and servant existed between the owners and the applicant.

HOLMES, L.J.:—

We have in this case a small coasting vessel. We have Owen and another, owners, and Kinsella, master; and, while he was master, a seaman employed on board met with an accident. If there was nothing more in the case, it would seem to me to be a matter of course that the seaman would be entitled to take proceedings under the Workmen's Compensation Act against the owners of the ship. The whole controversy turns on the agreement between Jones and Kinsella. The first thing that appears in that document is, that Jones, acting on behalf of the owners, gives the command of the ship to Kinsella, who is there in writing appointed master. It proceeds to say that he is to work the vessel, receiving for his services two-thirds of the gross freights. Kinsella is to be appointed master, and he is to receive for his services not so much a week, or a month, but a sum that can be easily ascertained. I can see nothing in the agreement that makes Kinsella anything else than master. He has power to hire seamen and is given some rights that would otherwise belong to the owners. Here the injured seaman proceeds against the registered owners. Their defence is, that they demised the ship, and that Kinsella is part owner and charterer of the vessel; but even if that were so, it would make the three of them partners. I have no hesitation in coming to the conclusion that the decision of His Honour Judge Barry was right.

(1) 3 Butterworth, 106.

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CHERRY, L.J. :—

I agree. The question for our decision is, was there evidence to support the finding of the County Court Judge that Kelly was the servant of the owners of the ship? Now it was expressly admitted by Mr. Hanna and Mr. Fitz Gibbon that in any ordinary case where a crew is engaged by the master they are still the servants of the owners. Is there anything in the agreement relied upon by the owners in this case to show that the seamen were in a different position? It does not contain a word about engaging, dismissing, or controlling seamen. It leaves these matters in the same position as in any ordinary case. The only special provision is to be found in the words that give two-thirds of all freights to the master, out of which he is responsible for, and agrees to pay, all the crew's wages, &c., and all other expenses connected with the working of the vessel. But I think this was merely by way of indemnity to the owners, as it clearly was in the case of port-dues. The seamen employed on the ship are in every case controlled by the master, and are, even if they are servants of the owners, liable to be dismissed by the master, exercising a delegated authority on behalf of the owners. I think that there was ample evidence to support the decision of the County Court Judge.

Solicitor for the applicant: *J. H. M'Carroll.*
Solicitors for the respondents: *Stanuell & Son.*

W. G.

THE KING (JULIA KENNEDY) *v.* JUSTICES OF COUNTY CORK (1).

K. B. Div. 1911. June 20.

Justices—Jurisdiction—Obstruction to highway—Goods exposed for sale on street during fair—Evidence—Public market—Bona fide *claim of right—Ouster of jurisdiction.*

On a prosecution by the M. District Council for obstruction to the public street of the town of M., there was evidence that the act complained of as an obstruction was the exposing for sale, during a public fair held in the streets of the town of M., of goods on the pavement; that the same class of goods had been sold at such fairs in the public street twenty years before; and that public fairs had been held in the streets of the town for twenty years and upwards. The prosecutrix, the defendant in the prosecution, claimed before the justices the right so to expose her goods, but was convicted and fined. Upon motion to make absolute a writ of *certiorari* to bring up and quash the conviction:—

Held, that on the evidence it might be inferred that the dedication of the street was subject to the right to hold thereon public fairs at stated intervals, that there was evidence that the prosecutrix had the right to sell her goods as a member of the public at such public fair, and that there was, consequently, a *bona fide* claim of right on her part to do the acts complained of as an obstruction, which claim being material to their decision ousted the jurisdiction of the justices.

When there is a *bona fide* claim of right material to the decision, as the justices have no jurisdiction to determine the existence of the right, they have no jurisdiction to determine whether, in the case before them, there has been an excessive user of the alleged right.

MOTION to make absolute a conditional order for *certiorari* to bring up for the purpose of being quashed a conviction by the justices sitting at Macroom Petty Sessions on the 12th April, 1911, of one Julia Kennedy on a complaint by the Macroom Urban District Council. The complaint made by the council against Julia Kennedy was that "on the 14th March, 1911, at Macroom, county Cork, the defendant did wilfully and by

(1) Before PALLES, C.B., MADDEN and WRIGHT, JJ.

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misbehaviour prevent and interrupt the free passage of carriages and persons on the public street by allowing certain cloths and other merchandise to remain thereon, and refusing to remove same when requested so to do."

The conditional order was obtained upon the 11th May, 1911, upon the affidavit of Julia Kennedy. Affidavits showing cause were filed by Mr. Michael Purcell, Clerk of the Council, and Mr. H. B. Minehear, and other justices who sat at the hearing of the complaint; and affidavits on behalf of the prosecutrix, Julia Kennedy, were filed by Mr. C. W. Ashe, and Mr. O'Leary, one of the justices present at the hearing. From these affidavits, and the exhibits therein referred to, the following statement of the facts is taken:—

The prosecutrix, who traded in old clothes, was summoned on the charge already stated at the instance of the Macroom Urban District Council. The prosecutrix appeared, in answer to the summons, before the justices of the Macroom Petty Sessions on the 14th March, 1911, and was represented at the hearing by Mr. William Ashe, her solicitor. The case presented on her behalf was, that the acts complained of in the summons were done by the prosecutrix under a *bona fide* and reasonable supposition of right; that the justices had no jurisdiction to hear the complaint; and that the summons was irregular in that it contained the words "wilfully and by misbehaviour," as the acts complained of were done only in pursuance of the customary exercise of a claim of right. The acts complained of resulted from a practice followed by the prosecutrix and other dealers in clothes at the fairs held at the town of Macroom. These fairs were held partly on the streets of the town of Macroom and partly on the fair field, and the urban council were the lessees of the patentees of the fairs as well as being the street authority. It was alleged in the affidavit of Mr. Purcell, Clerk of the Council, that the practice of spreading clothes on the street pavements was exercised to a considerable extent by the prosecutrix and other clothes dealers, who came from the city of Cork, and that the practice had resulted in obstruction to the shops fronting the pavement.

The magistrates sitting at the hearing, with the exception of Mr. Jeremiah O'Leary, who dissented, convicted the prosecutrix.

The certificate of the conviction followed the words of the summons, and stated the order of the Court to be conviction and fine with costs, and in default of payment imprisonment for three days without hard labour.

The conviction did not express any finding upon the question whether the acts complained of were done in *bona fide* exercise of a claim of right; and there was a conflict in the affidavits filed for prosecutrix and to show cause, as to whether the magistrates at the hearing expressed any opinion, or gave any decision, on that question.

The prosecutrix stated in her affidavit that the magistrates did not adjudicate upon the honesty or sincerity of the claim of right put forward on her behalf, but convicted without regard thereto. Mr. Purcell, in his affidavit, stated that the magistrates found as a matter of fact that there was no *bona fide* claim of right, that the evidence called by the prosecutrix directed to that point was unreliable, and that they would not act on the same, being of the opinion that, even if that evidence were true, it did not in law amount to the establishment of a *bona fide* claim of right. The affidavit filed by Mr. Minehear and the other justices who adjudicated (excepting Mr. O'Leary) stated that the justices decided that there was no *bona fide* claim of right, and that the claim had been put forward merely for the purposes of delay. In reply to the affidavit of the justices and Mr. Purcell, Mr. Ashe, the solicitor for the prosecutrix, stated in his affidavit that the justices merely found obstruction by the prosecutrix, and that they made no further announcement, and gave no reason for their decision; and Mr. O'Leary, the dissenting justice, stated that no decision on the question of *bona fide* claim of right was made by the justices; that the other magistrates who adjudicated on the case were in doubt, and knowing that neither the complainants nor the prosecutrix would abide their decision, and being anxious that the real question in the case as to the law should be decided in a higher Court, merely stated there was an obstruction, and fined the prosecutrix a nominal sum; that the Resident Magistrate, Mr. William J. O'Hara, openly expressed a wish that the matter should go to a superior Court; that, when in consultation, the magistrates did not state that the claim

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put forward by the prosecutrix was for the purposes of delay, the only question discussed being whether the council had power under the statute to regulate the traffic in the streets.

Sergeant Sullivan, K.C. (with him, *Maurice Healy*), for the prosecutrix:—

In *R.* (*Christie*) v. *Justices of Londonderry, R.* (*Ballantine*) v. *Same* (1), the question for decision was the right of the owner to obstruct the highway. Obstruction of the highway by persons resorting to a fair is a matter which has been the subject of decision at an early date: *R.* v. *Smith* (2). Where fairs are held on a thoroughfare, the owner of the fair has no right to remove the fair to any place less convenient or less open, and people using the fair are entitled to return to the old place if the new place is less open: *R.* v. *Starkey* (3). *Townend* v. *Woodruff* (4) shows that persons resorting to market are entitled to occupy the ground in a fair with baskets and crates. *Gingell* v. *Stepney Borough Council* (5) is a strong decision: there a statute passed in 1870 established a highway; and it was held that a public right to a market in an adjoining street extended to the highway dedicated by the statute, which was silent as to markets rights in 1870.

The real question in the case is whether, when people have for twenty years done the acts complained of in a public fair, there is not a public right to do those acts in exercise of the right to such fair. That is a claim of right, and the justices had no jurisdiction to adjudicate upon that, nor to decide that there was no *bona fide* claim of right. [Counsel also referred to *Ellis* v. *Bridgnorth* (6).]

George M'Sweeney, K.C., for the Justices:—

There is evidence that at least on one occasion before, this same matter was before the justices, when they convicted and agreed to state a case. That was never followed up, and the case was

(1) [1902] 2 I. R. 266.
(2) 4 Esp., pp. 109, 110
(3) 7 Ad. & Ell. 95.
(4) 5 Ex. 506.
(5) [1908] 1 K. B. 115.
(6) 2 Johns. & H. 67.

never taken. In this case the Resident Magistrate and the other justices who convicted were not asked to state a case; there is no doubt that, had they been so asked, they would have consented. In *R.* v. *Justices of Londonderry* (1), where two shopkeepers claimed a right to obstruct a street, it was held that a *bona fide* claim to such right was immaterial.

Gingell v. *Stepney Borough Council* (2) does not apply. There, admittedly, there was a franchise to hold fairs, and it was unlimited. A *bona fide* claim must be put forward with some legal colour.

Counsel also referred to *Mayor of Norwich* v. *Swan* (3) and *Mayor of Yarmouth* v. *Groon* (4).

Maurice Healy, in reply.

PALLES, C.B.:—

There is no doubt that there is jurisdiction under the Summary Jurisdiction (Ireland) Act, 1851, in the justices to decide upon a question of wilful obstruction to a highway, but that jurisdiction is subject to certain well-known principles that define and restrict it, of which one of the most ordinary is, that if a *bona fide* question of title arises which is material to the decision, the jurisdiction is ousted: *R.* (*Christie*) v. *Justices of Londonderry* (1). The defendant's case was, that where and when she exposed her goods for sale a market was being lawfully held. There was evidence that during the last twenty years and upwards the market had been held there to the obstruction of the public thoroughfare—evidence from which it might have been inferred as a fact that the dedication of the place as a public highway was subject to the right to hold a market thereon at stated periods, of which there was evidence that the time in question was one. The prosecutrix was there as one of the public, and as such claiming a right to sell her goods in the market; and there was evidence that she had the right as one of the public.

The right of the defendant is objected to, in the first place, because twenty years ago only two persons sold there the goods

(1) [1902] 2 I. R. 266.
(2) [1908] 1 K. B. 115.
(3) 2 Wm. Blackstone, 1116.
(4) 1 H. & C., p. 102.

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she sells, and now several persons sell this class of goods in the market; the right those two persons exercised twenty years ago was not shown to be any special right in them, or to be any right other than of them as two members of the public. Secondly, it is objected that formerly persons used carts upon which to expose for sale these old clothes, and that the defendant here claims the right to use the ground for exposing them upon; but, as to that objection, I shall say no more than that, to my mind, it would be more difficult to justify an obstruction by a cart than obstruction on the ground. Thirdly, it is said she was told to go to a different part of the fair, viz., the fair green, and she did not go; but no regulations were proved which authorized any person to give such direction, and there is the further answer to all these objections, that the justices do not find that by reason thereof the prosecutrix's claim was not *bona fide*.

There is a question raised here as to the extent of the right. As to it, it is not necessary, upon a motion for a *certiorari* to quash the decision of magistrates who had no right to entertain a matter of title, to distinguish the decision in *Townend* v. *Woodruff* (1) from the *Northampton Case* (2).

When a thing is done, as here, in the exercise of an alleged right, the existence of which the justices had not jurisdiction to negative, and there are questions of excess beyond that right, as there may have been here, as the magistrates have not jurisdiction to determine the existence of the right, neither have they jurisdiction to determine its extent. The case was wholly without the jurisdiction of the justices, and accordingly the writ of *certiorari* must issue. The applicant in the summons must pay the costs.

MADDEN and WRIGHT, JJ., concurred.

Solicitor for the prosecutrix: *C. W. Ashe.*

Solicitor for the Macroom Urban District Council: *M. Purcell.*

C. N. K.

(1) 5 Ex. 506. (2) 2 Stra. 1238.

TODD, BURNS, & CO., LIMITED, APPELLANTS; THE LORD MAYOR, ALDERMEN, AND BURGESSES OF DUBLIN, RESPONDENTS (1).

K. B. Div. 1913. April 18, 30.

Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *section* 1, *sub-section* 1—*Bank holiday—Christmas Day—Week-day—Two bank holidays in one week—Statute—Construction—Words in singular not read as including plural—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *section* 1, *sub-section* 1 (*b*).

Section 1, sub-sect. 1, of the Shops Act, 1912, enacts that on at least one week-day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon; provided that this provision shall not apply to the week preceding a bank holiday if the shop assistant is not employed on the bank holiday, and if on one week-day in the following week in addition to the bank holiday the employment of the shop assistant ceases not later than half-past one o'clock in the afternoon.

H. was employed as an assistant in the appellants' shop on each week-day of the week ending Saturday, the 21st December, after half-past one. In the following week he was not employed on Christmas Day or the day following, but was employed on every other week-day of that week after half-past one in the afternoon. The appellants were charged on summons with having failed to comply with section 1 of the Shops Act, by employing H. for every day of the week ending the 21st December, after the hour of half-past one in the afternoon.

Held, it being assumed that Christmas Day was a bank holiday within the meaning of the Act, that the expression "bank holiday," in sub-sect. 1 of section 1, must be read in the singular only; that the expression "week-day" was used in contradistinction to Sunday, and not to holiday; and that therefore the case came within the proviso in sub-sect. 1, and the appellants could not be convicted of the offence charged.

Quære, is Christmas Day a bank holiday within the meaning of the Shops Act, 1912?

CASE STATED by Mr. Mahony, one of the divisional justices of the police district of Dublin metropolis, pursuant to 20 & 21 Vict. c. 43.

The appellants were charged as defendants in a summons, in which the respondents were complainants, with having failed to

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comply with the provisions of section 1 of the Shops Act, 1912, by employing about the business of their shop a shop assistant named Martin Hugh for every day of the week ending the 21st December, 1912, after the hour of half-past one in the afternoon of each day. The following facts were proved, or admitted, before Mr. Mahony :—

1. That the said Martin Hugh was employed by the defendants about the business of their drapery shop after the hour of half-past one in the afternoon on every day of the week which ended at midnight on Saturday, the 21st December, 1912.

2. That during the following week, which commenced at midnight on Saturday, the 21st December, 1912, the said Martin Hugh was employed every week-day after the hour of 1.30 p.m., with the exception of Christmas Day and St. Stephen's Day, upon which days he was not at any time employed.

It was contended on behalf of the defendants that, having regard to the provision in section 1, sub-section 1, of the Shops Act, 1912, they had not committed the offence mentioned in that section.

Mr. Mahony was of opinion that the defendants had committed the offence, and fined them one shilling. At the instance of the defendants he stated the present case, requesting the opinion of the Court as to whether he was right in his determination.

James O'Connor, K.C. (with him *Gerald Horan*), for the appellants :—

The case comes within the proviso in sub-section 1 of section 1 of the Shops Act, and the appellants ought not to have been convicted. The contention of the respondents is, that the proviso does not apply, because the assistant did not, in the week ending the 28th December, get a half-holiday in addition to the two whole holidays given on Christmas Day and St. Stephen's Day. To support this contention, the respondents must establish two propositions: first, that Christmas Day is a bank holiday; and secondly, that the expression "bank holiday" is to be read in the plural, so as to include "bank holidays." We submit that Christmas Day is not a bank holiday. It is not included among

the bank holidays in England and Ireland specified in the schedule to the Bank Holidays Act, 1871, although expressly mentioned as a bank holiday in Scotland. But even assuming that Christmas Day is held to be a bank holiday within the Shops Act, the present case comes within the proviso in sub-section 1 of sect. 1. The intention is plain on the face of the Act that the expression "bank holiday" in that sub-section is to be read in the singular only. The scheme of the Act is, that if in a particular week there is a bank holiday, and the assistant is not employed on that day, and is also given a half-holiday on some other day in that week, he need not have been given a half-holiday in the preceding week. Here the assistant, in the week ending the 28th December, was given not merely a whole holiday and a half-holiday, but two whole holidays. There is no obligation to close a shop on Christmas Day or St. Stephen's Day. If the usual half-holiday had been given in the week ending the 21st December, all that the assistant would have been entitled to under the Act in the following week would have been one half-holiday. [He also referred to section 4, sub-section 5, of the Act.]

Ronan, K.C., and *P. O'C. White*, for the respondents:—

Christmas Day is a bank holiday within the meaning of the Shops Act, 1912. By section 19, sub-section 1, the expression "bank holiday" includes any public holiday or day of public rejoicing or mourning. The expression "bank holiday" in sub-section 1 of section 1 is to be read so as to include the plural, bank holidays: Interpretation Act, 1889, section 1, sub-sect. 1 (*b*). To justify the employer in refusing the half-holiday in the week ending the 21st December, the assistant should have been given in the following week a half-holiday in addition to the two bank holidays. The half-holiday must be given on a "week-day." The expression "week-day" is used in contradistinction not only to Sunday, but to holiday: *Phillips* v. *Innes* (1). Week-day in the sub-section means a working day. The intention is that the employer, to get the benefit of the proviso, should make a concession of a half-holiday on a working day.

Horan, in reply.

(1) 4 Cl. & F. 234.

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April 30.

PALLES, C.B.:—

This is an appeal from the decision of Mr. Mahony, one of the divisional justices of Dublin, who convicted the defendants of a breach of section 1 of the Shops Act, 1912, 2 Geo. 5, c. 3.

That section enacts that on at least one week-day in each week a shop assistant shall not be employed about the business of a shop after half-past one in the afternoon. Then follows a proviso that this provision shall not apply to the week preceding a bank holiday, if two conditions are satisfied: viz., first, if the shop assistant is not employed on the bank holiday; and second, if on one week-day in the following week, *in addition* to the bank holiday, the employment of the shop assistant ceases not later than half-past one in the afternoon.

The complaint was in respect of the employment of one Martin Hugh during the week ending Saturday, 21st December. He was employed about the business of the defendants' shop on each week-day of that week after half-past one o'clock in the afternoon. Therefore the question is, Is the proviso applicable to the case? If it is not, the conviction is right.

The week in question was "the week preceding" the 26th December, which is a bank holiday; and on Christmas Day, another day in the same week, Martin Hugh was not employed at all.

The case for the prosecution depended on two propositions. Of these, the first was that Christmas Day, although not a bank holiday under the Bank Holidays Act, 1871, 34 Vict. c. 17, was within the definition of bank holiday in the Act of 1912. As the definition of bank holiday in the Act of 1912 includes "any *public* holiday," I shall assume, without deciding, that Christmas Day was a bank holiday within the meaning of the Shops Act.

Thus there were, in the week following that ending 21st December, not only one bank holiday, but two—Christmas Day, and the 26th December. The second proposition of the prosecutors then is that "bank holiday," in the expression in the proviso "if the shop assistant is not employed on the bank holiday," must be read as including the plural "holidays"; that, consequently, the exemption of Martin Hugh from employment

on both of those days was necessary to satisfy the first condition; and that therefore the second condition was not satisfied, because his employment did not cease at half-past one o'clock "on one week-day *in addition* to the bank holiday." It was also argued that Christmas Day was not a "week-day."

Upon the first question, I am of opinion that the section itself shows clearly a contrary intention to "*the* bank holiday" being read in the plural. The subject-matter of the enactment is one particular day out of each particular week. The provision exempting a particular week from the operation of the enactment is based upon a state of facts existing in a week in which a bank holiday occurs which affords exemption from employment in excess of the length of the weekly half-holiday provided by the enactment. The excess is, under the statute, to be to some extent compensated by the omission of the weekly half-holiday in the previous week; and the existence of such an excess is to be determined by matters of which "holiday" is an essential part. To read the singular expression, "day," or "holiday," in the plural, in the determination of that question, would be, in my opinion, to work havoc with the intention. If, in such an enactment, "holiday," in the singular, were held to be capable of being read in the plural, its entire scheme would be upset. I am, consequently, of opinion that that word must be read in the singular only.

Then, to satisfy the second condition, the day in the following week, in addition to the bank holiday, in which the employment is to cease not later than half-past one, must be a *week-day*. It is said that this is not so in the present case, because the Wednesday, on which Christmas Day fell, was not "a week-day"; it being argued that "week-day" is used in contradistinction to "holiday." In my opinion, the ordinary meaning of "week-day" is a day other than Sunday, and by the use of this word "week-day," Sundays are excluded from the operation of the Act. Further, in the Bank Holiday Act of 1871, with which the present Act is *in pari materia*, "week-day" is used in the sense of being a day "other than Sunday." In the schedule to that Act we find the words, "The twenty-sixth day of December, *if a week-day*," which in this context means a day not being Sunday.

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As, then, in the week commencing at midnight between Saturday, the 21st, and Sunday, the 22nd, there was the 26th December (the Bank Holiday), and also Christmas Day, on neither of which days Martin Hugh was employed, the case, in my opinion, was within the proviso; and consequently the conviction must be quashed, and the Corporation must pay the costs.

KENNY, J., concurred.

Solicitors for the appellants: *J. L. Scallan & Co.*
Solicitor for the respondents: *Ignatius J. Rice.*

J. G. T.

Appeal. 1913.

June 6.

COONEY *v.* WILSON AND HENDERSON (1).

(1913. No. 2164.)

Practice—Service out of the jurisdiction—Parties—Co-defendants—G. O. XI, R. 1 (h)—Action for tort—Principal and agent.

W., who was resident in England, wrote a number of libels concerning C., who was resident in Ireland, and employed H., a bill-poster, also resident in Ireland, to post, publish, and circulate them in the vicinity of C.'s residence. In an action by C. against W. and H. for damages for the libels, H. being served in Ireland, and there being, in the opinion of the Court, no ground for alleging that he was not *bona fide* made a defendant:—

Held, that a concurrent writ was properly ordered to be served on W. in England.

Ross v. *Eason*, ([1911] 2 I. R. 459), and *Sharples* v. *Eason* (ibid., 436, 442), distinguished.

APPEAL by the defendant, William Dennis Wilson, from the order of Boyd, J., sitting for the King's Bench Division, dated the 14th May, 1913, refusing with costs the said defendant's application to set aside a previous order made by his Lordship *ex parte* on the 24th February, 1913, on the application of the plaintiff, giving the plaintiff liberty to issue a concurrent writ of summons for service

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

on the defendant, Wilson, in England. The writ had been served on the defendant, William Henderson, in Ireland. The action was one of libel contained in posters which, it was alleged, had been posted by the defendants in the county of Fermanagh and elsewhere, also in leaflets and a pamphlet alleged to have been published and circulated by them in the same neighbourhood. These publications were unquestionably most gravely defamatory of the plaintiff, whom they in substance charged with having been guilty of criminal offences, with assisting the white-slave traffic, and with gross personal immorality.

It was treated as admitted that the defendant, Wilson, who resided in Suffolk, was the author of the libels, and that he employed the defendant, Henderson, to post the placards and circulate the leaflets and pamphlet. Henderson was a working bill-poster, and no mark for damages or costs. A considerable portion of the affidavits on both sides was directed to the question of convenience of trial—each party alleging that the greater part, if not all, the witnesses resided in the country, which, he said, was the proper place of trial. The question mainly argued, and the only one dealt with by the Court, was, however, whether the action was a *bona fide* one against Henderson, and, if so, whether Wilson was a proper party within the Rule.

Powell, K.C., *Gibson, K.C.*, and *Gustavus Hamilton*, for the appellant:—

In *Sharples* v. *Eason* (1) this Court, affirming the judgment of Wright, J., in the King's Bench Division, definitely established the principle that a plaintiff cannot bring himself within Order XI, Rule 1 (*h*), by serving the writ upon a sham defendant within the jurisdiction against whom no real relief is sought. To do so is an abuse of the process of the Court. Would the plaintiff have sued the pauper bill-poster, Henderson, except for the purpose of suing Wilson in Ireland? The party served within the jurisdiction is contemplated by the Rule as the chief and substantial defendant; and, where in such a case there is a necessary and proper party to the action resident outside the jurisdiction the

(1) [1911] 2 I. R. 436, 442.

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Rule, in aid of the plaintiff, allows said person to be served to avoid any objection as to want of parties: *Croft* v. *King* (1): see *per* Collins, J., p. 421. The action must be "properly" brought against the defendant within the jurisdiction. If there be ground for suspecting a *mala fide* attempt simply to serve a person out of Ireland, who could not otherwise be made amenable in Ireland, it is not an action "properly" brought in Ireland within the meaning of the rule: see the exhaustive judgment of Wills, J., in *Massey* v. *Heynes* (2), which contains a most valuable commentary on the corresponding English rule, Order XI, Rule 1 (*g*). Henderson was a sham party. The only relief in the action would be damages, and no damages could be recovered against him.

Henry, K.C. (with him *Wylie*), for the plaintiff:—

Both these parties were properly joined as defendants: Order XVI, Rule 4. Wilson was the principal, Henderson the agent, in the dissemination in Ireland, in the immediate neighbourhood of the plaintiff's own residence, of these atrocious posters. I take the definition of "proper party" from the judgment of Wills, J., in *Massey* v. *Heynes* (2), at p. 335: "I think that if according to the regular practice of the Courts of this country—supposing all parties subject to the jurisdiction—the person to be served is one who as a matter of course would be joined on the same writ, and be treated as one of the defendants in the action, he is a 'proper,' if not a 'necessary,' party to the action." *Chance* v. *Beveridge* (3) was a stronger case even than the present. The defendant residing in England there was merely a person in charge of the London office of the *Freeman's Journal*, against whom, at most, nominal damages could be recovered, and yet the Court of Appeal allowed service of the writ on the newspaper company.

Gibson, K.C., in replying, suggested that, even if the appeal were dismissed, the evidence at the trial should be limited to publications in Ireland. This was agreed to by counsel for the plaintiff.

(1) [1893] 1 Q. B. 419.
(2) 21 Q. B. D. 330, at pp. 334, 335.
(3) 11 Times L. R. 528.

O'BRIEN, L.C. :—

We have all arrived at the conclusion that the order of Boyd, J., save to the extent agreed on at the Bar, should not be disturbed. The facts are not in dispute. The libel, which is one of a very atrocious character, and suggested the most abominable crimes against the plaintiff, was posted in various parts of Ireland. One of the defendants, the one responsible for the libel, admits that he was author of the libel. At the time the writ of summons was issued there was no such admission. If the bill-poster and the concocter of the libel had both been resident within the jurisdiction, it would have been impossible to say that both might not have been properly joined as defendants—one the principal, the other the agent. When we get so far, we have to see what is the meaning of the General Order (XI, R. 1 (*h*)). In *Massey* v. *Heynes* (1), Lord Esher, in construing the corresponding English Rule (XI. 1 (*g*)), says :—"According to our present practice in such a case as this, there being one transaction, and the plaintiff having an alternative remedy against one or other of two persons, he is entitled to claim relief in the same action alternatively against one or other of the two,—to state facts which, if his allegations are true, show that he is entitled to this alternative relief against one or other of the two parties who have been concerned in the one transaction. To what period of time does the rule in question apply? It must certainly apply to the time of the service of the writ, or notice of the writ. How can the Court deal with the case then? Not according to the result of the trial of the action; they cannot take into account what may be the result of the trial, or they could never decide who would be a 'proper party' to the action until the trial was over. The question whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction must depend on this,—supposing both parties had been within the jurisdiction, would they both have been proper parties to the action? If they would, and one only of them is in this country, then the rule says that

(1) 21 Q. B. D. 330.

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the other may be served, just as if he had been within the jurisdiction. This is the legislation on the subject, and we are bound by it."

Language could not be clearer than that. If they were both proper parties if within the jurisdiction, and if the action clearly lies against the party actually resident within the jurisdiction, the other may be served just as if he also were resident within the jurisdiction.

The next case is *Chance* v. *Beveridge and the Freeman's Journal (Limited)* (1), in which the *Freeman's Journal* was brought within jurisdiction of the English Court of Queen's Bench. The Court of Appeal refused to discharge the order giving leave to serve the writ on the Newspaper Company, which had been granted on the ground that the co-defendant, Beveridge, who was served at his office in the Strand, was a proper party to the action. It is difficult to see how any substantial damages could in fairness have been recovered against him, as he was only a clerk of the Company in charge of their office in London. I lay stress on that, because it is suggested here that as the defendant in the present case who is resident within the jurisdiction is a pauper, he cannot have been made a party *bona fide*.

It appears to me to depend altogether on whether the action would lie against both defendants if both were within the jurisdiction.

We were pressed with this, that the Court of Appeal in the case of *Ross* v. *Eason & Son, Limited, and others* (2), set aside the order that had been made there for service out of the jurisdiction. But there was no repudiation of the principles laid down in *Massey* v. *Heynes* (3). On the contrary, the Lord Chancellor says, at pp. 463, 464:—"I do not express any opinion on the question whether, if an action had been properly brought against Eason & Son within the jurisdiction, the English defendants could have been joined as necessary or proper parties to that action."

He was not deciding the question which we have to deal with. Neither did the other members of the Court decide it. The Court

(1) 11 Times L. R. 528.
(2) [1911] 2 I. R. 459.
(3) 21 Q. B. D. 330.

was of opinion that on the evidence in that case there was no real cause of action against Eason & Son. They had clear evidence of that before them. How can that case be relied on as being in antagonism to the clear proposition laid down in the Court of Appeal in England? If there is a real substantial cause of action against both defendants, it would be most dangerous to hold that the mere fact that the one within the jurisdiction is a pauper can make any difference.

HOLMES, L.J.:—

This action is brought for libel contained in certain placards written and printed by the defendant, Wilson, who lives in England, and widely circulated in county Fermanagh, where the plaintiff is well known, by the other defendant, who was employed and paid for so doing by Wilson.

The contents of the placards are highly defamatory; and the only defence suggested is justification. It is quite clear that both defendants are equally responsible for the publication of the placards; and that if both could have been served in Ireland, it would have been perfectly proper to join them as defendants. Indeed, I am disposed to think that this would have been the usual course. The controversy in this appeal does not turn on whether both the defendants are not liable for the publication of the placards, but upon whether the plaintiff can sustain the order made by Boyd, J., to serve the writ on Wilson in England. This Order was made under Order XI, Rule 1 (*h*), which provides that service out of the jurisdiction may be allowed on a necessary or proper party to an action properly brought against some person duly served within the jurisdiction. The present case, on its admitted facts, would seem to come within both the words and the intention of this rule; and I believe that the appeal would not have been arguable, were it not for two recent decisions of this Court. Indeed, for some time an imperfect recollection of those cases led me to think that they governed the present; but further consideration has satisfied me that they have no application thereto. In each of those

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cases, *Ross* v. *Eason* (1) and *Sharples* v. *Eason* (2), one of the defendants were Eason & Son, the extensive Dublin newsagents, who were joined as defendants with the publishers of a London newspaper in an action for libel contained therein. In neither case were Eason & Son agents for the publishers. They purchased the newspapers, and resold them to their customers in the usual way.

Now there is authority for holding that newsagents thus carrying on their business are not liable for a libel contained in a newspaper sold by them in the ordinary course of trade, if they did not know of the libel; if their ignorance was not due to negligence on their part; and if they had no ground for supposing that the newspaper was likely to contain libellous matter.

Now in *Sharples* v. *Eason* (2) an order to substitute service on the publisher was obtained, and defences were filed by both defendants, whereupon notice of trial was served on the London defendant, and, on the same day, notice of discontinuance was served on Eason & Son. In these circumstances the Court ordered the action to be stayed, on the ground that the conduct of the plaintiff amounted to an admission that he had no cause of action against Eason & Son, and that the foundation for the order of substitution of service had disappeared. *Ross* v. *Eason* (1) turned on the same point. We had there what I think was ample evidence that the plaintiff knew that he had no cause of action against Eason & Son, and that he had only joined them as defendants to enable him to sue the other defendants in Ireland. To prevent misunderstanding, and speaking for myself, I would not in these cases have been prepared to hold, merely on the evidence of Eason & Son, that there was no cause of action against them. I am disposed to think that in such a case there would be a question for the jury. My decision rested on evidence furnished by the conduct of the plaintiff himself.

I have gone a little fully into the grounds of these decisions, as I think they must have been misunderstood by the plaintiff's counsel. It is evident that the present case is wholly different.

(1) [1911] 2 I. R. 459. (2) *Ibid.*, 436, 442.

Here an English principal acted through an Irish agent. Both are responsible for the publication. It is said that the Irish defendant is too poor to pay damages; but that is no reason for holding that the plaintiff was not justified in suing him for what is *prima facie* a most serious libel, and for joining with him another person equally responsible. The action is properly brought against the Irishman; and the Englishman is a proper defendant to it. Hence the case comes within the rule, and the appeal must be disallowed.

CHERRY, L.J. :—

I concur. During the arguments I was at first inclined to think that *Ross* v. *Eason* (1) was a conclusive authority in Mr. Gibson's favour; but, on consideration, I do not think that it is so. There are important points of difference between the two cases. In the first place, Eason & Son were not the agents of the English defendants (2); the cause of action against them was for an independent tort. Here Henderson was clearly the agent of Wilson. Principal and agent usually and properly are sued together in such cases as this. In the second place, though we assumed in *Ross* v. *Eason* (1) that an action might lie against Eason & Son, we came to the conclusion, on the facts, that they were joined as defendants in the writ, not for the purpose of recovering damages against them, as no plaintiff could have expected to recover more than merely nominal damages against them under the circumstances, but for the purpose of bringing the case colourably within the General Order XI, Rule 1, so as to obtain leave to serve the English defendant out of the jurisdiction. Here there is no ground for alleging that Henderson was not *bona fide* joined as a defendant. Though he may be a poor man, he was the actual tort-feasor, and in my opinion there is no evidence of want of *bona fides* in naming him as defendant along with Wilson.

Solicitors for the plaintiff: *Clarke & Gordon.*
Solicitors for the defendant Wilson: *Hamilton & Craig.*

W. G.

(1) [1911] 2 I. R. 459. (2) *Ib.*, p. 461.

K. B. Div. 1913. Jan. 13.

THE KING (UPRICHARD) *v.* THE JUSTICES OF THE COUNTY OF ARMAGH (1).

Justices—Bias—Conduct of interested justice calculated to lead public to think he was taking part in the adjudication.

U. was prosecuted before the justices at Petty Sessions for having on his premises purloined yarns. The prosecution was brought by the direction of a linen trade association, and on the complaint of their inspector. When the case came on, U.'s solicitor objected to any magistrate taking part in the proceedings who was a member of the association. M., who was one of the justices, and was presiding as chairman, stated that he was a member of the association, but that he had no personal interest and would adjudicate. At the close of the statement of the complainant's case, and before any evidence was given, M. left the chair, and took his seat on the bench, some distance from the other magistrates. After a short time, he left the bench and went into the magistrates' room, and was there when the other magistrates came in to consider their decision, but at once retired. He took no part in the adjudication. U. was convicted of the offence charged.

Held, that the conviction must be quashed with costs, to be paid by M.

CERTIORARI.

On the 6th July, 1912, Thomas Russell, the inspector appointed by the Lurgan Linen Trade Association, swore an information before a justice of the peace, in which he stated that he had reasonable cause to suspect that William Uprichard, the prosecutor herein, had in his possession at his premises in Lurgan a quantity of purloined or embezzled cloths, yarns, etc., and prayed for a warrant to search the dwelling-house and premises of Uprichard. On this information Thomas Russell obtained a search-warrant under the provisions of 3 & 4 Vict. c. 91, s. 6, and, accompanied by several police constables, searched the said premises, and found certain boxes containing shells and chains of yarn. Uprichard was thereupon arrested and brought before a justice of the peace, and remanded on bail to appear at Petty Sessions. The case,

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and WRIGHT, JJ.

after an adjournment, came on for hearing on the 3rd September, 1912, at Lurgan Petty Sessions, before ten justices, the chairman being Mr. H. J. M'Geagh. In an affidavit made by Mr. O'Hagan, Uprichard's solicitor, to ground the application for the conditional order hereinafter mentioned, the following matters were set out:—

Mr. O'Hagan, at the commencement of the proceedings, objected to any magistrate taking part in the proceedings who was interested in the linen business. He also objected to any magistrate taking part in the proceedings who was a member of the Lurgan Linen Trade Association, on the ground that the prosecution was brought by the inspector of that Association, and at the direction of the Association, and in the interests of the Association. Of the ten magistrates who constituted the Court, five were engaged in the linen business, and three of these, viz., Messrs. M'Geagh (the chairman), Allen, and Bell, were members of the Association. This Association had been formed for the purpose of protecting the interests of those engaged in the linen trade, and Thomas Russell, the complainant, had been appointed inspector of the Association for the purpose of inquiring into and detecting cases of purloining and embezzling yarn, and prosecuting persons suspected of committing those offences, and in his capacity as such inspector had instituted the proceedings. Mr. Allen left the seat where he was sitting, and retired to a seat at the end of the bench. Mr. M'Geagh stated that he was a member of the Lurgan Linen Trade Association, but had no personal interest in the case, and that he would adjudicate. The other justices remained in their places, and said nothing. Mr. Menary, the solicitor for the complainant, then proceeded to open the case at length, and just as he was concluding, Mr. M'Geagh, who was still acting as chairman, had a conversation with some of the other magistrates, and then retired from the chair, and took a seat at the corner of the bench. During the hearing of the case Mr. M'Geagh retired to the magistrates' room, but returned again, and sat down at the end of the bench; and when the evidence concluded he retired with the other magistrates to the consulting-room, and remained with them for some time when they were deliberating.

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The Court, by a majority of the justices, convicted the defendant of the offence charged. The entry in the Petty Sessions order-book did not include the name of Mr. M'Geagh, Mr. Allen, or Mr. Bell among the names of the justices set out as those by whom the order was made.

The prosecutor obtained a conditional order for a writ of *certiorari* to bring up and quash the conviction, on the ground (amongst others) "that it was contrary to justice that justices who were engaged in the linen business, and were members of the above-mentioned Association, should adjudicate in the case, and several of the justices were personally interested in the case and were biassed."

Mr. M'Geagh, in an affidavit made by him, and filed by way of cause against making the conditional order absolute, stated that when Mr. O'Hagan requested magistrates who were members of the Lurgan Linen Trade Association to retire, he declined to do so; but immediately before any evidence was given he changed his mind and retired. That the chair was thereupon taken by Mr. English, and the deponent went to the extreme left-hand end of the bench (which is about 26 feet long) and sat there at a distance from the group of seven magistrates, including the resident magistrate, who adjudicated in the case. After a short time he left the Court, and went into the magistrates' room, where he remained for a considerable time. He then came out into Court, and, as the case had not concluded, he again sat at the end of the bench for a short time, and again retired into the magistrates' room. When there, the seven magistrates came in to consider their decision. He at once went out of the room into Court, where he remained until the magistrates came out and announced their decision. Except as so stated by him, he took no part whatever in the hearing or adjudication of the case in Court. It was not a fact that he entered into consultation with any of the magistrates during the case. He denied that he had any personal interest in the case. It had always been the custom at Lurgan Petty Sessions for magistrates who declined to adjudicate to retire to the end of the bench, where, owing to the length of the bench, they were completely separated from the

other magistrates, and no one in Court could regard them as adjudicating.

Mr. Allen made an affidavit, stating that before Mr. O'Hagan made his request he left his seat on the bench, and went to the extreme right end of the desk allotted for magistrates, leaving a considerable space between where he was and the group of magistrates who sat close together and tried the case. He took no part whatever in the hearing of the case, and when the evidence was finished he sat where he was while the magistrates retired to their room, and until they came back into Court and announced their decision.

Mr. Bell made an affidavit stating that shortly after Mr. O'Hagan's request he left the bench and went into the magistrates' room, and thence left the Courthouse altogether. He returned to the Courthouse in about ten minutes, and finding that the Uprichard case had not concluded, he sat down close to Mr. Allen at the extreme right-hand side of the bench, where Mr. Allen and he remained separate and distinct from the magistrates who were trying the case, and they continued to sit there when the seven magistrates who tried the case retired to the magistrates' room, and until they returned and announced their decision.

The present application was on behalf of the prosecutor to make absolute the conditional order for the writ of *certiorari*, notwithstanding cause shown.

James O'Connor, K.C. (with him *Bartley*), for the prosecutor:—

Mr. M'Geagh, as a member of the association which directed the prosecution, was clearly an interested party. Yet, notwithstanding objection by the defendant's solicitor, he acted as chairman during part of the hearing, and when he subsequently left the chair, he still remained on the bench, and was afterwards in the magistrates' room when they were considering their decision. He had an opportunity of communicating his views to the other magistrates. The mere presence on the bench of a magistrate who is interested is sufficient to vitiate the order, even though that magistrate takes no part in the proceedings. An interested

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magistrate should not remain on the bench, or converse, or communicate with any member of the Court: *Reg.* v. *Justices of Surrey* (1); *Rex* v. *Lancashire Justices* (2); *Ex parte Clarke* (3). The administration of justice should be such as to remove even from suspicious minds a belief that it proceeds from interested motives. Nothing is more likely to lead to such a supposition than a magistrate sitting on the bench during the hearing and determination of a case in which he is interested: *Reg.* v. *Justices of Surrey* (1), *per* Coleridge, J. It is extremely important that persons should not even appear to form part of a Court, or be in a position in which they could be supposed to have any influence, where they are interested in a case: *Rex* v. *Lancashire Justices* (2), *per* Lord Alverstone, C.J. [He also referred to *Eckersley* v. *Mersey Docks and Harbour Board* (4); *The King* (*Taverner*) v. *The Justices of Co. Tyrone* (5).]

T. W. Brown, for Messrs. M'Geagh, Allen, and Bell:—

Mr. M'Geagh was entitled to hear enough of the case to satisfy himself that he was interested in it. As soon as he was satisfied of this he made it clear by his conduct that he was taking no further part in the case. In *Reg.* v. *Justices of Surrey* (1) the interested justice was present both at the hearing and the determination. The fact of an interested justice being on the bench during part of the hearing does not vitiate the conviction if the justice can show he took no part in the discussion of the case: *Reg.* v. *The Justices of Hertfordshire* (6). [He also referred to *Reg.* v. *Budden and others* (7).]

Bartley, in reply:—

Mr. M'Geagh, in his affidavit, does not attempt to make the case that he remained merely for the purpose of seeing whether he was interested or not. The nature of Mr. O'Hagan's objection showed him clearly that he was interested. [He referred to *Reg.* (*Burke*) v. *The Justices of Galway* (8).]

(1) 1 Jur. (N. S.) 1138.
(2) 94 L. T. 481.
(3) 26 L. R. Ir. 1.
(4) [1894] 2 Q. B. 667.
(5) [1909] 2 I. R. 763.
(6) 9 Jur. 424.
(7) 60 J. P. 166.
(8) 31 I. L. T. R. 160.

LORD O'BRIEN, L.C.J. :—

This case has been very ably argued. I hesitated much during the argument, and am not even now altogether free from doubt; but having considered the matter very carefully, I am, on the whole, of opinion that the decision of the magistrates should not be allowed to stand. I think that Mr. M'Geagh, once he was apprised of the nature of the case, ought to have left the bench. Its nature was accurately stated by the defendant's solicitor, and Mr. M'Geagh had the Information before him. Instead, however, of yielding to the objection that was made to his sitting, he remained during the entire of the opening statement of the complainant's solicitor, who is said to have opened the case at length. During the progress of a lengthy statement, a magistrate is in a position to make many inquiries and say many things relevant to the nature of the case; and the public, from his position as chairman, would naturally think he was participating in the hearing of the case. At the conclusion of the opening statement Mr. M'Geagh left the chair. He did not then retire from the bench, but sat for a short time at the end of it. He afterwards went to the magistrates' room, and was there when the other magistrates came in. He states that he at once left when they came in, but it would be easy for a magistrate, in such circumstances, to give a hint as to his view of the case.

On these grounds, I am of opinion that the conviction ought not to stand. Justice ought to be administered in such a way as to prevent the public thinking that there was undue interference by an interested magistrate.

As to the costs of this application, I have not so strong an opinion on the point as my brethren, but I am influenced, and no doubt influenced rightly, by them, and agree that Mr. M'Geagh should pay the costs.

GIBSON, J. :—

I am of opinion that the conviction should be quashed, and that Mr. M'Geagh should pay the costs of this application. I do not ground my decision on the position that a magistrate who refuses to leave the bench at once, when challenged on the ground

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of bias, never can have a *locus poenitentiae*. But looking at the whole facts of the case, that Mr. M'Geagh, having refused to yield to the defendant's objection, remained in the chair during the entire opening statement, that when he left the chair he took a seat at the end of the bench, and that he was in the magistrates' room when the other magistrates came in to consider their decision, and had an opportunity of communicating with them, I am of opinion that Mr. M'Geagh placed himself in a position calculated to cause reasonable apprehension of bias affecting the hearing and decision of the case.

WRIGHT, J., concurred.

Solicitor for the prosecutor: *Edward O'Hagan.*

Solicitor for Messrs. M'Geagh, Allen, and Bell: *T. G. Menary.*

J. G. T.

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Jan. 28, 29, 30, 31. Feb. 24.

THOMAS *v.* VISCOUNT ASHBROOK AND THE HONOURABLE FRANCES MARY WHITE (1).

(1912. No. 8500.)

Money-lender—Interest grossly in excess of risk—Transaction re-opened as harsh and unconscionable—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *sect.* 1.

Where on a loan by a money-lender the rate of interest charged is grossly excessive as compared with the risk, having regard to the facts as to the financial position of the borrower known to the lender, or which would have been known to him if he had made proper inquiries, the Court may re-open the transaction as being "harsh and unconscionable" within the meaning of section 1 of the Money-lenders Act, 1900, although the borrower is competent, and there is no element of fraud or other unfairness in the transaction.

Interest charged at the rate of 80 per cent. per annum where the Court was of opinion that the reasonable rate, having regard to the risk and all the circumstances, should not have exceeded 25 per cent., held sufficient of itself to entitle the borrower to have the transaction re-opened.

MOTION on behalf of the defendants that the judgment of the Judge at the trial, in favour of the plaintiff, be set aside, and judgment entered for the defendants, or in the alternative for a new trial.

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

The plaintiff was a money-lender, living and having his registered place of address in London. The defendants resided in Ireland. The defendant, the Hon. Mrs. White, was a daughter of the defendant Lord Ashbrook. She was a married lady, living with her husband.

In May, 1909, Mrs. White and her husband were on a visit to Lord Ashbrook. Mrs. White saw a post card sent to her father by a London money-lender named Fortescue, intimating that he was prepared to make advances. Mrs. White was the owner of a small landed property which she was in the habit of letting for grazing, but, owing to her land having been boycotted, she was unable to let it as usual in the year 1909, and had to stock it herself, for which purpose she required money to buy cattle. She resolved to apply to Fortescue for a loan, and wrote to him on the 17th May, 1909, stating that she had seen his card sent to her father, and asking him on what terms he would let her have £100 on a bill backed by her father. In reply to a letter from Fortescue, which was not given in evidence, Mrs. White wrote to him on the 25th May, stating that her father's income was derived from landed estates and trust funds, and amounted to about a gross sum of £6000 per annum. That her own income was £200 per annum derived from trust funds, and that she also held some 100 acres of land, together with the residence from which she dated the letter, and 90 acres. She inquired how long the loan could remain out if the interest was paid, and the terms. She received a letter dated the 26th May, 1909, from the plaintiff, stating that Mr. Fortescue was unable to attend to the matter, but that it had been mentioned to the plaintiff, and that he would "have pleasure in advancing you the sum of £100 for £20 interest payable at three months, provided your father will sign the promissory note jointly with you. Should you so desire, the promissory note can be renewed at the expiration of the three months on payment of the £20 interest which will then be due." He enclosed the promissory note for £120, stating that if received back, jointly signed, the £100 would be at once forwarded to Mrs. White in Bank of England notes. Some correspondence then passed between Mrs. White and the plaintiff as to the terms on which the note would be renewed if portion was paid off when it fell due. On the 2nd June, 1909, Mrs. White wrote to the

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plaintiff enclosing the promissory note for £120, signed by her father and herself, dated the 26th May, 1909, and payable three months after date; and the following day the plaintiff sent Mrs. White £100 in Bank of England notes.

The note was renewed three times, £20 being paid on the occasion of each renewal. On the 26th May, 1910, Mrs. White wrote to the plaintiff enclosing £20 interest on the loan of £100, and applying for a further loan of £100 on the same terms, namely, a bill signed by Lord Ashbrook and herself for £240, this to include the old loan. The plaintiff wrote the following day, stating that he would be pleased to arrange the matter as requested, and enclosing Bank of England notes for £100, together with a promissory note for £240, dated the 27th May, 1910, and payable three months after date, to be signed by the defendants. This note was signed by the defendants, and was renewed several times, £40 being paid on each renewal. The last renewal was by a note dated the 23rd April, 1912, and payable on the 27th May, 1912. This was a renewal of a note which had become due on the 27th February, 1912.

In April, 1911, Mrs. White wrote to the plaintiff, asking for a further loan of £50, on a bill to be signed by her father and herself, the amount to be repaid in less than a month. The plaintiff wrote on the 20th April, 1911, stating he would be pleased to advance the amount on the joint promissory note of the defendants for £60, payable at three months, regretting that he could not make the advance for a shorter period. He enclosed £50 in Bank of England notes, together with the promissory note. This note, dated the 20th April, 1911, was signed by the defendants, and sent to the plaintiff. The note was renewed several times, £10 being paid on each renewal. The last renewal was by a note, dated the 23rd April, 1912, and payable on the 20th July, 1912.

As the several promissory notes given from time to time were about to fall due, the plaintiff wrote to Mrs. White, reminding her of this, and stating that he would be pleased to renew the same.

It appeared that in the interval between the first and the second loan to Mrs. White, Lord Ashbrook had obtained on his own account a loan of £260 from the plaintiff on the same terms as Mrs. White. This was paid off in January, 1910.

The writ in the present action was issued on the 27th July, 1912,

and claimed £240, due on foot of the promissory note for that amount of the 23rd April, 1912, and £60 due on foot of the promissory note for that amount of the same date.

The defendants in their defence, in addition to formal traverses of the making of the notes, alleged that at the time of the making of the notes the plaintiff was a money-lender, and that the notes sued upon were given by the defendants as security for moneys advanced by the plaintiff as a money-lender to the defendants. That the amounts charged for interest, expenses, inquiries, fines, bonus, renewals, and charges, in respect of the sums actually lent, were excessive, and the transactions were harsh and unconscionable, or were such that a Court of Equity would give relief. The defence set out particulars showing that the defendants had, by the quarterly payments made by them on the several renewals, paid the plaintiff £300 on foot of the two advances of £100; and £60 on foot of the advance of £50. The defence then alleged that the amount fairly due to the plaintiff in respect of principal, interest, and charges, on foot of the note for £240 did not exceed £50 in addition to the £300 repaid, being £200, the amount actually advanced, and £150 for interest and charges thereon; and the defendants brought the sum of £50 into Court, in satisfaction of the plaintiff's claim on foot of the note for £240. The defence also alleged that the amount fairly due to the plaintiff in respect of principal, interest, and charges, on foot of the note for £60 did not exceed £15 in addition to the £60 repaid, being £50, the amount actually lent, and £25 for interest and charges thereon; and the defendants brought the sum of £15 into Court in satisfaction of the plaintiff's claim on foot of the note for £60.

The defendants, by way of counterclaim, claimed relief under the Money-lenders Act, 1900, and to have the entire transaction, commencing with the first loan, re-opened, and an account taken between the plaintiff and the defendants, and to be relieved from payment of any sum in excess of the amount fairly due in respect of principal, interest, and charges.

The plaintiff in his reply disputed some of the particulars set out in the defence. For the purpose of the present report it is sufficient to say that it was admitted that the several sums paid by the defendants on the occasions of the renewals, together with the money brought into Court, amounted to a sum equal

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to the moneys advanced with interest at a rate exceeding 25 per cent. per annum.

The action was tried on the 19th December, 1912, before Boyd, J., without a jury, the defendants' counsel opening. Mr. Gamble, the defendants' solicitor, was examined. The original report of Boyd, J., contained the following statement of his evidence: "He gave evidence of the financial condition of the defendant Mrs. White, in May, 1909, which he estimated at something over £700 a year, allowing £120 a year for the free occupation of her residence, and £120 a year for the use of the lands attached thereto and the estimated profits of farming the lands in her possession &c. As these were only estimates by him, I do not set them out in detail. He also estimated Lord Ashbrook's estate, which for a similar reason I do not refer to." A further note of the evidence, subsequently furnished by Boyd, J., contained the following particulars of Mr. Gamble's evidence:—"Financial position in May, 1909. £200 under settlement. Being free in house, occupation rent of house, £120 a year. Rents of land, £120. Royalty, £130. Farming of lands attached, £150. Lord Ashbrook's income about £1800 a year from settled estate. From trust fund of marriage settlement, £600. Unsettled property, £65."

Mrs. White was also examined and stated:—"I am a daughter of Lord Ashbrook. In 1909, I had a farm which I used to let for grazing. It was boycotted in that year, and I could not let it. I had to stock it myself. When I was staying at my father's house, a postcard arrived for him from a Mr. Fortescue. The letter of the 17th May, 1909, was written by my husband, and signed by me. I did not go to a solicitor. Particulars of property given by Mr. Gamble right." On cross-examination she stated:—"Plaintiff did not force the £100 on me. I voluntarily agreed to pay. I was quite satisfied to pay the £20 for the use of the £100 for three months. . . ."

No witnesses were called for the plaintiff.

The report of Boyd, J., concluded as follows:—

"Having heard Mrs. White examined, I came to the conclusion that she was a clear-headed and shrewd lady, and quite competent

to look after her own interests. She is a lady of mature years. She and her husband and her father were cognizant of the whole arrangements for the loan, and I have no doubt they all thought that by stocking the land which was boycotted the loss of the grazing rents would be recouped. In coming to the conclusion at which I arrived with regret, I could not overlook the absence of any solicitation or inducement on the part of the plaintiff in reference to the loan, and the thorough competence of the defendants to realize what obligation they incurred by obtaining the money. I was struck by the clear and unambiguous manner in which the amount of the interest required was stated. Usually, in money-lending transactions, the loan is to be repaid by instalments, and on the failure to pay any of these the whole loan and interest thereon becomes payable. There were no such complications in the present case. The loans were for three months definite, and the interest was only payable at the expiration of that term. For three years the defendants paid the interest, and obtained renewals of the principal amount due, on the same terms. This was at the request of the defendants themselves, without any solicitation or inducement of the plaintiff; and, as I have said, the defendants were perfectly competent to look after their own interests. There was no colour of fraud on the part of the plaintiff. The interest for the loan was high, but not so extravagant that I could consider it harsh or unconscionable. Surely, if the defendants were persons of good means, they might have paid off a small loan like this at the expiration of any three months, and borrowed elsewhere? They evidently considered that the loan was more valuable to them than the interest they had to pay for it. I presume cattle were purchased by the loan, and a greater profit resulted from them than the amount of the interest they were paying. They could have paid off the amount from the sale of the cattle during the three years they kept the money. I think it is unlikely that Mrs. White depreciated the amount of her income when she applied for the loan. She stated that she had £200 a year, and not £700, as estimated by her solicitor, who only became her solicitor in 1910. As to Lord Ashbrook's property, it does not appear whether it has been sold, or, if so, whether he has yet received the purchase-money; at all events

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his solicitor paid off his loan without questioning the rate of interest. I was referred to the case of *Samuel* v. *Newbold* (1), but the facts of that case are quite unlike the present. Mr. Alton, the borrower in that case, was a dissolute man, and had the appearance of having taken drink when he borrowed the money at 104 per cent. interest; and at the time he was undoubtedly a man of wealth. I do not think a Judge has a right to constitute himself a nurse for competent borrowers in the absence of some fraud which may have induced the loan. On the consideration of the whole of the facts of this case, I felt constrained to decide in favour of the plaintiff and give judgment for him for the amount of his claim."

Chaytor, K.C. (with him *Swayne*), for the defendants:—

We submit that judgment should have been entered for the defendants. The transaction should have been re-opened on the ground of the interest being excessive, and the transaction harsh and unconscionable; and the defendants should have been relieved from the payment of any further sums than those paid on the several renewals and the moneys brought into Court. Excessive interest is of itself, if unexplained, sufficient to render a transaction harsh and unconscionable, even though there are competent borrowers, and no fraud on the part of the money-lender. Where, as here, the interest is *prima facie* excessive, the onus lies on the money-lender to show that the transaction is not harsh and unconscionable: *Samuel* v. *Newbold* (1), *per* Lord Loreburn, L.C. (p. 467), *per* Lord Macnaghten (p. 470), *per* Lord James of Hereford (pp. 473, 474), *per* Lord Atkinson (p. 477); *Blair* v. *Buckworth* (2); *Fieldings* v. *Pawson* (3); *Poncione* v. *Higgins* (4); *Part* v. *Bond* (5). The result of the decisions in *Samuel* v. *Newbold* (1), *Blair* v. *Buckworth* (2), and *Fieldings* v. *Pawson* (3) is well stated in Mathews and Spears, as establishing three propositions:—(1) That excessive interest alone may be sufficient to condemn a transaction

(1) [1906] A. C. 461.
(2) 24 Times L. R. 474.
(3) Matthews and Spear on the Money-lenders Act, p. 148.
(4) 21 Times L. R. 11.
(5) 94 L. T. R. 390.

as harsh and unconscionable. (2) That where, in the opinion of the Judge, the interest is *prima facie* excessive, having regard to the risk and to all circumstances of the case, the burden of proof shifts on to the money-lender to prove that the transaction was not harsh and unconscionable. (3) That while the borrower's competence, &c., must be of great importance, yet where the interest charged is grossly excessive, the money-lender will not discharge the burden of proof by merely proving that the borrower was a competent borrower, and that he fully understood and appreciated the transaction.

Excessive interest means interest in excess of what is fair, having regard to the risk run and all the circumstances of the case: *Fieldings* v. *Pawson* (1), *per* Farwell, L.J. (p. 155). The test is the risk as appearing to the money-lender at the time of the loan, having regard to the facts as to the financial position of the borrower known to the lender, or which would have been known by proper inquiries: see judgment of Vaughan Williams, L.J., in *Saunders* v. *Newbold* (2). Here, from the information which was furnished to the plaintiff of the financial position of the defendants, which he could have verified by inquiries, it was evident that there was no substantial risk; therefore a charge of interest at the rate of 80 per cent. per annum was *prima facie* excessive, and threw on the plaintiff the onus of showing that the transaction was not harsh and unconscionable. This onus he has not attempted to discharge, as no evidence was given on his behalf at the trial. That the plaintiff was satisfied that there was very little risk is shown by the fact that he himself invited the defendants to renew from time to time, and that when applied to for the loan of £50 to be repaid within one month, he insisted on its not being repayable for three months. The sums that have been paid on the several renewals, together with the moneys lodged in Court, represent the principal moneys advanced with interest at the rate of over 30 per cent. per annum.

(1) Matthews and Spear on the Money-lenders Act, p. 148.

(2) [1905] 1 Ch. 260, at p. 275.

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Hanna, K.C., and *Leet* (with them *Henry, K.C.*), for the plaintiff:—

This is not an agreement for interest at the rate of 80 per cent. per annum until repayment of the principal. No rate of interest *per annum* is reserved. If the first note for £100 had not been renewed, and the defendants had failed to pay it, all that the plaintiff could have recovered as interest would have been £20, however long it might have been before he could by legal proceedings recover his money. The delay to which the plaintiff may be put in recovering the loan must be taken into account in estimating the interest in a case of this kind, where there is no provision for continuing interest. In the present case the sums for which judgment was given at the trial, together with the sums paid on the occasion of the several renewals, would represent the amounts lent, with interest, up to date of judgment, at a rate somewhat under 60 per cent. per annum. This rate of interest will be still further reduced by the delay consequent on the present motion, with the possibility of additional delay caused by an appeal which could be carried to the House of Lords. There was considerable risk here. The plaintiff had only the personal security of the defendants. Lord Ashbrook was an old man, and had only a life interest. It does not appear what was the nature of Mrs. White's interest in the properties from which her income was derived. Both borrowers here were competent persons, and entered into the transaction with their eyes open; there is no suggestion of fraud on the part of the plaintiff, and no default clause; yet it is contended that not only Mrs. White, the principal, but also Lord Ashbrook, the surety, is entitled to re-open the transaction. As far as Lord Ashbrook, at all events, is concerned, it is impossible to say that he was acting under the pressure of necessity, since he was not applying for, or getting, any of the money. The fact that the borrower has thoroughly understood the transaction, and, knowing all the facts, has been quite willing to pay the interest asked, is one of the circumstances which the Court must consider: *per* Channell, J., in *Carringtons* v. *Smith* (1), which, as far as this proportion is concerned, is not

(1) [1906] 1 K. B. 79.

overruled by *Samuel* v. *Newbold* (1). If the Court is satisfied that the borrowers knew what they were doing when they signed the note, it ought not to interfere: *Harris* v. *Clarson* (2). In *Samuel* v. *Newbold* (1) there was an element of fraud. There were surreptitious dealings between the money-lender and one Sagar, who negotiated the loan—sufficient, Lord Macnaghten states (p. 470), to avoid the transaction according to the principles of a Court of Equity. Where, as here, there are competent borrowers, no fraud or unfair dealing, and no default clause, the Court will not re-open the transaction merely on the ground of the interest being excessive, unless, at least, it is so excessive as to be, to use the expression of Lord Macnaghten in *Samuel* v. *Newbold* (1), "monstrous." In considering what is an excessive rate of interest it is to be taken into account, as pointed out by Channel, J., in *Carringtons* v. *Smith* (3), that the efforts of the Legislature to assist borrowers have the effect of raising the normal rate of interest.

As to the rate of interest which has been allowed where the transaction has been re-opened, see *Wheatley* v. *Part* (4); *Saunders* v. *Torrington* (5); *Samuel* v. *Bass* (6); *Levene* v. *Torrington* (7); *Fieldings* v. *Pawson* (8); *Burton* v. *Swifte* (9); *Michaelson* v. *Nichols* (10); *King* v. *Hay Currie* (11); *Harris* v. *Clarson* (12); *Fortescue* v. *Bradshaw* (13).

Swayne, in reply, referred to *In re A Debtor* (14); *Carringtons* v. *Valerie* (15); *Wade* v. *Schaffer* (16); *Rae* v. *Joyce* (17).

Cur. adv. vult.

Feb. 24

GIBSON, J.:—

The point before us for decision is whether an excessive rate of interest was charged, and whether the transaction is impeachable as harsh and unconscionable by reason of such excessive rate alone,

(1) [1906] A. C. 461.
(2) 27 Times L. R. 30, at p. 31.
(3) [1906] 1 K. B. 79.
(4) 27 Times L. R. 303.
(5) Collard on Money-lenders Act, p. 388.
(6) *Ibid.*, p. 636.
(7) *Ibid.*, p. 292.
(8) *Ibid.*, p. 228.
(9) *Ibid.*, p. 171.
(10) 26 Times L. R. 327.
(11) 28 Times L. R. 10.
(12) 27 Times L. R. 30.
(13) *Ibid.*, p. 231.
(14) [1903] 1 K. B. 705.
(15) 119 L. T. Journal, 62.
(16) Collard on Money-lenders Act, p. 417.
(17) 29 L. R. Ir. 500.

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there being no allegation of any other unfair dealing, or of misconception of the contract on the part of the borrower. The history of the transaction is contained in a long correspondence commencing with a letter from Mrs. White, dated May 17th, 1909. She appears to have been pressed for money to carry out a foolish project of stocking a boycotted farm. The first note, dated May, 1909, was for three months for £120, the cash advance being £100. This was renewed three times, £20 being paid on the occasion of each renewal. On May 26th, 1910, Mrs. White applied for a further loan of £100, and the money was at once sent, without requiring a new note to be signed in advance. £20 was paid on the last renewal of the £120 note, and a new consolidated note for £240 was executed. This was renewed several times, £40 being always paid on each renewal. After February 27th, 1911, the plaintiff sent the renewals unasked, as a normal mode of dealing. A further loan of £50 was applied for in April, 1911, and plaintiff sent notes, with bill to be signed for £60. This also was renewed repeatedly. The present action is brought for £240 on the last renewal of the large note, dated 23rd April, 1912, and payable on 27th May, 1912; and for £60 on the last renewal of the smaller note, dated April 23rd, 1912, and payable on July 20th, 1912. The defence states the figures of payment inaccurately, omitting one of £40; there is a lodgment in Court of £50 in respect of the £240 note, and £15 in respect of the £60 note. The question argued has been whether the defendants are entitled to statutory relief, and whether the payments before action, with the £65, are sufficient to satisfy the plaintiff's claim as revised by the Court. The defence has been allowed to be amended in any way to give effect to any rights of defendants on the facts found by the Court.

The Act prescribes two conditions to revision—the rate of interest or charge must be excessive, and the transaction must be harsh and unconscionable; both questions of fact to be determined on the particular circumstances of each case. Mere excess, standing alone, gives no right to re-open, but it may be such as to render the transaction unconscionable.

As to excess: the interest or charge may be *ex facie* so exorbitant as to make the conclusion irresistible that an unfair advantage has been taken of desperate necessity or reckless improvidence; the

thing not merely speaks for itself, but shouts. Where the rate is not of this manifestly oppressive character, it may appear, on the facts before the Court, *prima facie* excessive, if unexplained; but such apparent excess may be removed by the lender proving circumstances of risk which would justify the rate. The business of a money-lender is not like that of a banker dealing with customers of known credit. To a large extent the interest he charges may be regarded as a sort of insurance premium against loss of principal, or delay in recovering the debt. The reasonableness of such premium must be ascertained with reference to the conditions which were or ought to have been present to the mind of the lender at the time of the transaction, not the actual or true risk, which the event might show to have been trifling or non-existent. An advance made on the instant, without security, and without means of inquiry, might justify a rate which, if the true facts were known with certainty, would be excessive in relation to the actual risk. On the other hand, if the financial resources of the borrower are truly stated, and an opportunity of reasonable verification is afforded, the money-lender cannot, by unreasonably omitting, or professing to have omitted, inquiry which he ought to have made, support interest out of all honest proportion to the risk. In such case the money-lender is called on to explain and justify, if he can, the apparently excessive charge. Where no such explanation is given, the inference may be legitimately drawn that inquiries were satisfactory, or that the representations of the credit and means of the borrower were accepted as substantially correct.

The duty of the Court in retrospectively estimating the probable risk at the date of the transaction, and declaring whether the rate of charge is excessive or not, is difficult, and, in cases of personal credit, without security, is of peculiar delicacy. What has to be considered is "the risk and all the circumstances." The Court has to undertake the novel and trying rôle of a hypothetical reasonable and fair money-lender; and is obliged, in conditions defying the possibility of any certain computation, to declare a particular rate as reasonable and another rate as excessive. Different Judges, like different juries, may arrive at conflicting conclusions on the question of fact of reasonableness and excess, as

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is strikingly illustrated in *Fieldings* v. *Pawson* (1), where Lord Alverstone, C.J., and Farwell, L.J., though agreeing that the rate was excessive, were in conflict as to the reasonable rate, the former holding that 25 per cent. should be allowed, while the latter considered that 10 per cent. would be proper. The Lord Chief Justice there threw out that interest at or near 100 per cent. would be *prima facie* excessive. Cozens-Hardy, L.J., in *Wells* v. *Allott* (2), says that where interest on the face of the transaction appears to be excessive, whether it is 100 per cent. or *less* (he does not indicate how much less), the further inquiry has to be undertaken whether the interest is so excessive as to make the transaction harsh and unconscionable. In the infinite variety of circumstances affecting hazard, it is safer, I think, where the statute does not define excess, to abstain from laying down any particular figure as *prima facie* unreasonable. A loan may from its surroundings partake more of the nature of a speculative gamble than any calculable risk. All insurance is a kind of bet. In the equity cases this difficulty of remodelling the contract, and substituting what the Court considered a fair charge for the contract-figure, did not arise; it had to end, not to mend; the bargain was set aside as quasi-fraudulent, and, as a term of relief, repayment of principal and interest at 5 per cent. was required. Where the advance is on personal credit, the Court, if it reduces the interest, might possibly be asked to impose as a condition the obligation of paying the reduced sum.

I now turn to the facts. The learned Judge attached no importance to the evidence as to the financial position of the parties, and omitted it from his original report. His note has now been furnished to the Court. The evidence is rather vague, and it would have been more satisfactory if it had been vouched by documents. No attempt, however, was made to impeach or test it by calling for settlements, &c. (some stated to have been in Court and tendered to plaintiff's counsel at the trial), nor was there any proof that inquiries were made with unfavourable result.

Making every allowance for defendants' proprietary interests

(1) Collard on the Money-lenders Act, ed. 1912, p. 228.
(2) [1904] 2 K. B., at p. 848.

being in part for life only, eliminating the alleged royalty, and allowing a discount for over-sanguine estimate of value, we are of opinion that the risk, as it ought to have been fairly estimated at the time, did not warrant the rate charged. The transaction must be regarded as a whole, and not as consisting of separate loans for short periods. As Lord Selborne observes in *Aylesford* v. *Morris* (1), bills at short dates at high interest keep the debtor under perpetual pressure, falling on him as often as the bills reach maturity. The correspondence leaves on my mind the impression that the plaintiff thought the defendants were honest and fairly solvent folk. They accepted his terms without question, paid regularly, and were treated as profitable customers. The renewals effected at the plaintiff's invitation; the second loan of £100; the advance to Lord Ashbrook, duly paid off; the regular payment on renewal —a matter material in estimating risk and interest: Collard, p. 45— convince me that the charge of 80 per cent. was unreasonably high. The plaintiff called no evidence to rebut this *prima facie* excessive character. We cannot speculate as to his state of mind or reasons. On the original advances of £250, sums amounting to £400 have already been paid. The plaintiff seeks now to enforce payment of £300, that is to say, £700 is to be paid for the loan of £250. The charge seems to me excessive, having regard to the risk and circumstances, unless the view of my brother Boyd as to the intention of the Act, to be considered presently, is to prevail. I would not be disposed to put the fair interest at a figure higher than 25 per cent.

If the interest was excessive, was it unconscionably so? Lord James of Hereford, in *Samuel* v. *Newbold* (2), goes so far as to say, "This unexplained excessive interest of itself makes the contract harsh and unconscionable." He was referring to the particular facts before the House. The fact that the Court puts the risk lower than the money-lender did at the time of the advance, and that it, therefore, holds the interest excessive, does not necessarily fix the character of the transaction as unconscionable. The degree of excess has to be considered; besides, the risk may have been honestly over-estimated. Where no evidence is

(1) L. R. 8 Ch., at p. 498. (2) [1906] A. C. 461, at p. 476.

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adduced to account for the apparent excess, and the disproportion between charge and hazard is gross, the conclusion may be fairly drawn that the transaction is harsh and unconscionable; that is, as Lord Macnaghten interprets, in *Samuel* v. *Newbold* (1), "unreasonable and not in accordance with the ordinary rules of fair dealing." The interest, from its disproportion to risk, may show that undue advantage was taken of improvidence or necessity. Here the plaintiff should be taken to have known that the charge was excessive, and he acted unconscionably in imposing and exacting it.

This brings us to the point the basis of my brother Boyd's judgment. He holds that the Act was not intended to apply to competent borrowers, in the absence of some kind of fraud. The old rule in equity, as Collins, M.R., states in *Re A Debtor* (2), was that excess of interest alone was not a ground for setting aside a bargain in the absence of some particular relation, as, for instance, if the borrower was an expectant heir—and in the present case equitable relief could not have been given. *Samuel* v. *Newbold* (3) is quite irreconcilable with my brother Boyd's view. The statute was there interpreted as remedial and protective, creating a new right of relief, where the statutory conditions were satisfied, in cases outside equity jurisdiction. The Court cannot read into the statute conditions or restrictions not therein expressed, or decline to perform its statutory duty of considering and deciding the fact as to excess and unfairness, on the ground that the parties dealt at arms' length, were competent, and understood the bargain: *Blair* v. *Buckworth* (4).

The decision of the question of fact is not concluded by the mental capacity of the borrower. A university professor or a bank clerk might thoroughly appreciate the mathematical meaning of an enormous rate of charge, and still would be entitled to relief if he could show that the rate was in fact excessive and unconscionable in the circumstances. No doubt the business capacity and intelligence of the borrower are material elements in the determination of the question whether the statutory conditions

(1) [1906] A. C. 461, at p. 470.
(2) [1903] 1 K. B., at p. 709.
(3) [1906] A. C. 461.
(4) Collard, at p. 154.

are satisfied. An experienced merchant accepting onerous terms would find it more difficult to establish excess and oppression than a lady who, though educated and intelligent, might possess no business aptitude. Still, the difference of persons and training is only a factor; it is not decisive in law. Apparently sensible and intelligent persons may be compelled by emergency, or induced by improvidence, to accept unfair and oppressive terms. The specious professions of money-lenders attract many who ought not to be misled. So, shrewd Colonial visitors are entrapped by the confidence trick. In *Brooks* v. *Joyce* (1), Sir E. Sullivan, M.R., gave relief to a financial agent against a money-lender. Each case must be decided on its own particular facts; and the Court ought not to impose on itself a voluntary fetter, not to be found in the statute, that borrowers *sui juris*, dealing with their eyes open, cannot be allowed to complain if there has been no fraud or misleading. No such term can be imported into the enactment. The reasoning in *Samuel* v. *Newbold* (2) is adverse to any such implication, which would subject the new remedy to old equity conditions.

In the present case, the whole dealing is disclosed in the correspondence. Though Mrs. White was intelligent, she obviously did not possess any financial capacity. In the sudden emergency of having a boycotted farm thrown on her hands, she was induced to borrow first £100, and then another £100, for the purpose of stocking the farm. If she did so with the idea that the profit would yield enough to pay the money-lender's interest, she exhibited extreme folly. Acting originally from silly impulse, she kept on renewing, honestly paying the large charges on each occasion. I doubt if she or her father ever realized that she was paying 80 per cent. The rate is nowhere stated in the letters. In *Fieldings* v. *Pawson* (3) Farwell, L.J., thought that the rate ought to be specified.

The expression "all the circumstances," in the Act, refers, I think, to the circumstances connected with the risk, and the formation of the contract, and its character. It occurs in the section after the description of the statutory conditions, and con-

(1) Unreported.
(2) [1906] A. C. 461.
(3) Collard, p. 228.

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templates the terms of revision in relation to those conditions. It does not bring in a new independent condition, founded on the personality of the borrower, and detached from excess and unfairness. Personality is an important element, but does not justify the Court in refusing to consider excess and unfairness. The learned Judge appears to have considered that the non-payment of the notes at maturity, and the acceptance of renewals for such small sums, indicated the financial weakness of the defendants, and supported the reasonableness of the charge. Money-lenders encourage renewals where it is their interest to do so. The view referred to is opposed not only to the language of Lord Selborne in *Aylesford* v. *Morris* (1), but would enable money-lenders to justify any charge where renewals were taken. The plaintiff was obviously pleased with the defendants as customers, and wished to continue them in his books.

No case quite like the present has been cited, where there being no default clause, no misrepresentation, and the transaction altogether being carried out by letters, a rate of 80 per cent. was the subject of complaint. I have not attempted to criticize or compare the various cases collected in the works of Collard and Matthews, where the rate was reduced to 60 per cent., 45 per cent., 30 per cent., 25 per cent., and 10 per cent., or where relief was refused. As decisions on special circumstances they are of little help. To determine what is excessive, the Court must set up some kind of measure of its own. If where 150 or 100 per cent. was charged it reduces the rate to 25 per cent. (see *Wade* v. *Schaffer* (2), decided by Parker, J.), or 10 per cent., as in *Samuel* v. *Newbold* (3), I suppose the result would have been the same if only 80 per cent. had been charged, as such rate would have been grossly excessive as compared with 25 per cent. and 10 per cent. The right of redress cannot be confined to cases where the excessive interest is 100 per cent. or thereabouts. In the present case defendants would have submitted to £25, as well as to £20, per quarter, if asked; and possibly 80 per cent. was adopted to keep clear of Lord Alverstone's suggested 100 per cent. line. Excess depends on what the Court fixes on as fair.

(1) L. R. 8 Ch., at p. 498.
(2) Collard, p. 416.
(3) [1906] A. C. 461.

The action has been brought to trial to test whether there was liability over and above the £400 already paid and the £65 lodged in Court. In our opinion this £465 is sufficient, having regard to the risk and all the circumstances. The reasonable rate would not have exceeded 25 per cent.; and £465, as counsel admit, is more than enough on that basis. The pleadings can be amended accordingly. The plaintiff, having failed in his action, must pay the defendants' costs, and costs of this motion. In *Wade* v. *Schaffer* (1), where the plaintiff sought and obtained relief, Parker, J., gave him his costs.

The Lord Chief Baron concurs in this judgment, which is to be taken as our joint judgment.

MADDEN, J.:—

In the month of May, 1909, the defendant the Honourable Mrs. White, was staying at the residence of her father, the defendant Viscount Ashbrook. She saw a post card which had been sent to her father by a London money-lender, named Fortescue, and, standing in need of the sum of £100, she wrote on the 17th of May asking on what terms Fortescue would let her have this sum, what the rate of interest would be, and in how many instalments the amount would be repayable. Fortescue's answer is not in evidence, but from Mrs. White's reply of the 25th of May, it was evidently an inquiry as to the means of the borrowers. Mrs. White, in her letter of May 25th, states that her father's gross income was £6000 a year, derived from landed estates and trust funds; that her income was £200 a year, derived from trust funds; and that she held some 300 acres of land, together with the residence from which she dated the letter, and 90 acres. She asks how long the loan can remain out if the interest is paid, and inquires as to terms. The next letter is written by the plaintiff, to whom this business had been transferred by Fortescue. He expresses his readiness to advance "the sum of £100 for £20 interest payable at three months," provided her father joined in the note; adding, "Should you so desire, the promissory note can be renewed at the expiration of the three months on payment of the £20 interest which will then be due."

(1) Collard, p. 416.

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He closed the transaction there and then, so far as he was concerned, by forwarding the promissory note, on which, when jointly signed, the £100 would be forwarded in Bank of England notes. The note was signed by the defendants on June 2nd, after an inquiry by Mrs. White as to her position if she were to pay off a portion of the loan, in reply to which she was informed that if she paid £25 in addition to the interest, the plaintiff would renew for £75 at the same rate of interest, and the £100 was paid.

Postponing for the present the consideration of the relevancy of subsequent transactions, I approach the consideration of the question whether this transaction was, in the words of the statute, "harsh and unconscionable." It was, I think, unfortunate that a phrase should have been borrowed from the terminology which was adopted by Courts of equity in the exercise of a jurisdiction essentially different from that created by the statute of 1900. When we find Mr. Justice Channell saying that "harsh and unconscionable are not easy words to construe when the rules of the Court of equity have been put out of consideration" (*Carringtons* v. *Smith* (1)), it is not surprising that we find in the earlier decisions, in the words of Lord Macnaghten in *Samuel* v. *Newbold* (2) (p. 468), "an atmosphere of Chancery about the Act from which there is no escape." But whatever mists, arising from this source, may have gathered around the statute, were dispelled by the *lumen siccum* of the House of Lords. "The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other condition required": *per* Lord Loreburn, L.C., at p. 467. What, then, is the plain meaning of the phrase "harsh and unconscionable"? According to Lord Macnaghten these words mean "unreasonable, and not in accordance with the ordinary rules of fair dealing" (at p. 470), that is to say, in a word, unfair.

I proceed to consider the test by which the fairness or unfairness of a money-lending transaction is to be determined under

(1) [1906] 1 K. B., at p. 85. (2) [1906] A. C. 461.

the provisions of the statute. The first question to be determined is whether the rate of interest is excessive. Excessive is a relative term, and, at first sight, would seem to suggest comparison with some standard. But, as was pointed out by Channell, J., in *Carringtons* v. *Smith* (1), there can be no standard rate of loans on a promissory note without security, although there may be perhaps a market-rate for loans on security. For Judges to set up such a standard would be, in effect, "to read into the Act that which, as it seems to me, the Legislature intentionally avoided putting there, viz., a maximum rate of interest, such as was enacted by the old usury laws."

We find in a later portion of the section under consideration an indication of the sense in which the word "excessive" ought to be interpreted. When the Court has condemned a money-lending transaction as unfair, the duty is imposed on it to substitute an obligation to pay the sum "adjudged by the Court to be fairly due in respect of such principal, interest, and charges as the Court, having regard to the risk, and all the circumstances, may adjudge to be reasonable." The first matter to be considered is the risk, that is to say, the actual risk, as estimated by the Court with such knowledge as is attainable of the facts. But on the question of the fairness of the transaction, the risk must be considered with regard to all the circumstances of the case. Similarly in regard to the original transaction, before the question of its unfairness can be approached, the Court must find the stipulated rate of interest to be excessive; that is to say, excessive when compared with the actual risk as estimated by the Court.

This is the condition referred to by Lord Loreburn, in the passage which I have quoted, as necessary to be fulfilled before the transaction can be opened. If the Court on comparing the stipulated interest with the risk, as estimated by the Court upon the evidence before it, finds it not to be excessive, no further question arises. But if on this comparison the Court finds the interest to be excessive, the further question arises whether the transaction was "harsh and unconscionable," that is to say, unfair.

(1) [1906] 1 K. B. 79, at p. 91.

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In this inquiry the rate of interest is an important element. But in considering the question of unfairness on the part of the money-lender, the transaction must be viewed, not with reference to the actual risk, which may be unknown to the lender, but to the amount of knowledge of the financial condition of the borrower, and of the real nature of the risk which ought fairly to be attributed to the lender. There is an element of moral turpitude involved in unfair and unconscionable conduct in a transaction of the kind; and, in considering such a question, the risk ought to be considered, not as it existed in fact, but as it ought to have been present to the conscience of the lender.

This is the ground of the decision of Kekewich, J., in *Saunders* v. *Newbold* (1), affirmed by the Court of Appeal. "The ground upon which the learned Judge really does base his judgment is the absence of risk which ought to have been present to the mind of the money-lender": *per* Vaughan Williams, L.J., at p. 274. Further on (p. 275) the Lord Justice points out that Kekewich, J., based his judgment "on the fact that the absence of risk, having regard to facts as to the financial position of Alton [the borrower] which Philip Samuel [the lender] knew, or by proper inquiries might have known, rendered the terms of the loan harsh and unconscionable."

Applying these general principles to the facts of the case before us, I approach the initial inquiry: Was the rate of interest, 80 per cent., excessive in relation to the risk, as we are now in a position to estimate it? The evidence at the trial as to the financial position of the borrowers might have been given in a more satisfactory form. The effect of the settlements under which their income was derived was stated by their solicitor. Neither of the settlements was proved or given in evidence, but no objection was taken to Mr. Gamble's evidence on this ground. No evidence was given on behalf of the plaintiff, and I am prepared to accept Mr. Gamble's evidence as proving that Mrs. White was in receipt of an income of about £700 a year, of which £200 was a life interest under a settlement, as to which it does not appear whether or not she was restrained from anticipation; the remainder

(1) [1905] 1 Ch. 260.

consisted of rents of land, royalties, and profits derived from farming.

Lord Ashbrook's income, by which I understand his net income, is thus stated by the same witness: "about £1800 a year from settled estate, from trust fund of marriage settlement £600, unsettled property, £65." The cross-examination of this witness does not appear to have been directed to the accuracy of these figures, and I am prepared to accept his statements as substantially correct.

Performing, as best I can, the duty imposed on me by the Statute, I am of opinion that the rate of interest, 80 per cent., is greatly in excess as compared with the actual risk. I estimate the risk of ultimate loss of the money advanced as but slight. There was a risk of protracted legal proceedings, resulting in the recovery of a judgment bearing interest at a low rate, which would mean a considerable loss to a money-lender. But with the remedies open to a judgment creditor, by registration of his judgment as a mortgage, by proceeding for the appointment of a receiver, or in bankruptcy, I do not believe, having regard to the financial position of the borrowers, that there was a degree of risk which could be reasonably represented by a rate of interest at all approaching to 80 per cent.

Was the transaction unfair? I can find it in no element of unfairness beyond the exaction of an excessive rate of interest. It does not necessarily follow that a money-lending transaction founded upon an excessive rate of interest is unfair. The money-lender may have had no means of estimating the amount of risk, which may have been purposely concealed by the borrower, who may have had private reasons for accepting the money-lender's offer of a temporary loan on note of hand, without security and without inquiry. In the present case I have no hesitation in imputing to the lender a knowledge of the pecuniary position of the borrowers, and of the actual risk, which rendered the transaction, in the words of the Statute, "harsh and unconscionable." He did not enter into the business without inquiring as to the means of the borrowers, and he obtained a statement which was, in fact, substantially correct. He had, no doubt, recourse to the books of reference from which advertising money-lenders learn the names,

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descriptions, and residences of the Judges and Privy Councillors from whom they invite confidential communications. From these sources of information he would have ascertained Mrs. White's relationship with Lord Ashbrook, and his position in his county. The plaintiff has not been examined. He abstained from further inquiry, and, in the absence of evidence to the contrary, I conclude that he was satisfied to accept the statements as to the pecuniary positions of the defendants which were contained in Mrs. White's letter of May 25th. If so, the transaction was unfair; being, in the words of Lord Macnaghten, "unreasonable, and not in accordance with the rules of fair dealing," inasmuch as the rate of interest exacted was greatly excessive, as compared with the amount of risk, the knowledge of which should be imputed to the lender.

I do not think it necessary to consider the subsequent loans in detail. Whether the initial loan is considered by itself, or the series of loans are regarded as one transaction, which seems to be the true view of the case, the conclusion as to unfairness is the same. I will only point out that the inference as to knowledge of the plaintiff of the pecuniary position of the defendants becomes stronger with each successive loan. There was ample time to verify the statements upon which the first advance had been made before the renewal of the first note.

I concur in the judgment of my brother Gibson as to the rate of interest which should be allowed. It follows that the money lodged in Court is more than sufficient to meet the plaintiff's claim.

Solicitors for the plaintiff: *William Fry & Son.*
Solicitors for the defendants: *Carruthers & Gamble.*

J. G. T.

THE KING (THE LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST) *v.* THE RECORDER OF BELFAST (1).

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Belfast Local Acts—Police rate—General purposes rate—Exemption—Building erected and used for public worship—Belfast Improvement Act, 1845 (8 & 9 *Vict. c.* cxlii), *sects.* 348, 351—*County Antrim and Belfast Borough Act*, 1865 (28 & 29 *Vict. c.* clxxxiii), *sects.* 51, 53.

In order that property should be exempted from the police rate leviable under the Belfast Improvement Act, 1845, as being a "building erected and used for public worship," it is not necessary that the erection and user should be exclusively for such purpose; it is sufficient that this should be the main and principal purpose.

The exemption does not apply to the general purposes rate leviable under the County Antrim and Belfast Borough Act, 1865.

By the Belfast Improvement Act, 1845, the Corporation of Belfast are empowered to make a rate, known as the police rate, upon all hereditaments within the limits of the Act; and by the County Antrim and Belfast Borough Act, 1865, they are empowered to make a general purposes rate on the occupiers of all rateable property within the borough. Sect. 351 of the Act of 1845 provides that no person is to be rated in respect of any church, chapel, meeting-house, or other building erected and used for public worship. Sect. 53 of the Act of 1865 enacts that the provisions of the Act of 1845, relating to the making, collecting, or recovering of rates, and to appeal against the same, shall extend to the general purposes rate.

The Corporation having assessed the police rate and general purposes rate upon premises in the city of Belfast known as the Grosvenor Hall, the owners and occupiers of the Hall appealed to the Recorder of Belfast. It appeared that the Hall was built with the primary object of providing a large audience-chamber for religious services, and that such services continued the main object; and the Recorder found that the premises constituted in all essential respects a Methodist Church, unless some of the facts hereafter mentioned deprived them of that character. They were licensed for the celebration of marriages; and marriages were celebrated therein, and Baptism and Communion administered. There was a regular Church membership of 700 to 800 persons, and two stated clergymen. Public religious services were held twice or three times every Sunday. In addition to religious services, concerts and cinematograph exhibitions were held on the premises about twenty-five nights in each year, and literary and scientific lectures about thirty nights, a small charge for

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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admission being made to defray expenses. The premises were licensed under sect. 51 of the Public Health Amendment Act, 1890. The Recorder held that the premises were exempt from both police rate and general purposes rate.

Held, that there was evidence on which the Recorder could find, and that he rightly found, that the premises were erected and used for public worship, and were therefore exempt from the police rate.

But *held*, following and applying *Cunningham* v. *Belfast Corporation*, and *M'Causland* v. *Belfast Corporation* (see note, *post*, p. 450), that the exemption in sect. 351 of the Act of 1845, did not apply to the general purposes rate imposed by the Act of 1865, and that the premises were liable to this rate.

CERTIORARI.

The trustees of the Belfast Central Mission (hereinafter referred to as the trustees) were the owners and occupiers of the premises known as the Grosvenor Hall, in the city of Belfast, which premises were valued in the valuation lists for that city at the sum of £75. On the 3rd April, 1911, the Corporation of Belfast made a police rate, a general purposes rate, and a borough rate for the year ending the 31st March, 1912, and assessed and applotted the same upon these premises; and duly served notice thereof upon the trustees, demanding payment of such rates. The trustees served notice of appeal to the Recorder of Belfast against the police rate and general purposes rate. The appeal came on for hearing before the Recorder, and evidence was gone into and the case argued before him (1).

The Recorder decided in favour of the trustees as regarded both rates. At the request of counsel for the Corporation, and with the concurrence of the solicitor for the trustees, he made a "speaking order," setting out the facts found by him on which he came to his decision, so that the order might be capable of being reviewed in point of law by the King's Bench Division. The order, after reciting the matters set out in the first paragraph of this report, stated that the Court found the following facts:—

"The Grosvenor Hall premises consist of (*a*) a large hall capable of accommodating 2,500 people; (*b*) an annexe to same; (*c*) a vestry room; (*d*) a kitchen; and (*e*) another room which

(1) The cases of *Cunningham* v. *Belfast Corporation*, and *M'Causland* v. *Same* (*post*, note, p. 450), were not cited at the hearing before the Recorder.

may be called an office. When these premises were built, their primary object was to provide a large audience-chamber for religious services; and such services have been since, and still are, the main object of the buildings, and as such are first mentioned in the Annual Report, p. 20 (read in evidence and marked).

"These premises constitute in all essential respects a Methodist Church, except so far as some of the facts herein specially found may be held to modify or destroy, in whole or part, their character as such, *e.g.* they are licensed for the celebration of marriages, and marriages are celebrated in them. Baptism and Communion are administered, and there is a regular Church membership of 700 to 800 persons, and two stated clergymen. Public religious services are held twice every Sunday in summer, and thrice in winter.

"In addition to religious services strictly so called, various kinds of 'social work' are carried on upon the premises. These are set out (with others) on p. 20 of the said Annual Report. The 'Happy Evenings' mentioned therein are held about twenty-five nights in each year, and consist of organ recitals, cinematograph exhibitions, songs and recitations. There is a small money charge for admission, and the average receipts per night are £9 10*s*. This charge is not made to realize profit, but to defray expenses; and no profit is in fact made.

"'Literary and Scientific Lectures' are held about thirty nights each year, and a charge of from 6*d*. to 2*s*. is made for admission. The profit question as regards these stands in the same way as with regard to the 'Happy Evenings.' The premises are licensed under the Public Health Amendment Act, 1890, sect. 51; but cinematograph exhibitions were given on the premises for a long time before the license was obtained. There is no 'Consecration' of Methodist Churches. The premises were given the name 'Hall,' rather than 'Church,' because of an idea that people careless about religion would be more likely to enter a building passing under the former name."

The order then proceeded:—"The Court was of opinion and doth declare that on consideration of the facts so specially found the said premises were and are entitled to exemption from assessment of such Police Rate and General Purposes Rate by virtue of

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the provisions of s. 351 of 8 & 9 Vict. c. 142, and s. 53 of 28 & 29 Vict. c. 183, as being a building erected and used for public worship within the meaning of such section 351, and that the appellants are improperly rated in respect of such premises as regards such Police Rate and General Purposes Rate; and doth make no order as to costs."

The prosecutors obtained a conditional order for a writ of *certiorari* to quash the order of the Recorder, on the ground: "That the said order is on its face bad in point of law inasmuch as having regard to the facts therein set forth and to the provisions of the Belfast Local Acts applicable thereto the premises described are not entitled to be exempt from assessment of the Police Rate and General Purposes Rate therein specified on the grounds therein set forth."

Cause having been shown by the trustees, the present application was to make the conditional order absolute notwithstanding cause shown.

On the argument in the King's Bench Division, the deed declaring the trusts upon which the premises were held by the trustees was admitted by consent. It was a deed-poll dated the 29th March, 1894, made by a number of persons thereinafter called the trustees, reciting that by an Indenture of even date therewith the premises therein mentioned had been conveyed to the trustees in fee simple, and that the conveyance had been taken by them on the trusts thereinafter declared, that is to say (so far as material to the present report), upon trust that the said premises should be used and occupied in connexion with the City Mission carried on in the city of Belfast by the society of people called Methodists, in the connexion established by the late Reverend John Wesley, A.M., in such manner as the said trustees should determine.

R. F. Harrison, K.C. (with him *Ronan, K.C.*, and *Herbert Thompson*) for the prosecutors:—

The case involves questions as to two distinct rates.

First, as to the rate known as the police rate. The power to impose this rate was given by sect. 348 of the Belfast Improvement Act, 1845; sect. 351 containing an exemption "in respect of

any church, chapel, meeting-house, or other building erected and used for public worship." The question is, Do these premises come within the exemption? We submit that they do not. The words "church," "chapel," and "meeting-house" had, at the time of passing of the Act, well defined meanings—church, meaning a place of worship of the Established Church; chapel, meaning a Roman Catholic place of worship; and meeting-house, meaning a Presbyterian place of worship. The subsequent words, "or other building erected and used for public worship," were used to include places of worship of other religious bodies, that is to say, buildings used in the same way as churches, chapels, and meeting-houses, namely, exclusively for public worship. Here not merely are concerts and other entertainments given in the hall, but a licence has actually been obtained under sect. 51 of the Public Health Amendment Act, 1890, a section which is expressed to be for the regulation of places "ordinarily used for public dancing or music, or other public entertainments of the like kind."

Secondly, as to the general purposes rate. Prior to the year 1865 these premises would have been liable to county cess by 19 & 20 Vict. c. 63, sect. 2, which imposed liability to county cess on all hereditaments liable to poor rate; and these are hereditaments liable to poor rate under the Poor Relief (Ireland) Act, 1838, 1 & 2 Vict. c. 56, sect. 63, not being within any of the exemptions mentioned in that section. See also the Valuation (Ireland) Act, 1852, sect. 12. The County Antrim and Belfast Borough Act, 1865, sect. 51, substituted for county cess the general purposes rate, which the corporation were empowered to make on the occupiers of all rateable property within the borough, according to the annual value of the same. The sections of the Poor Relief Act and Valuation Act already referred to show that this is rateable property. The premises are entered by the Commissioner of Valuation as rateable hereditaments, and this is conclusive that they are such: *Whaley* v. *The Great Northern Railway Co.* (1). It will be argued that rateable property within sect. 51 of the Act of 1865 includes only property which would be rateable under the Act of 1845, and that these premises, being

(1) *Ante*, pp. 142, 171.

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exempted by sect. 351 of that Act, are not liable to the general purposes rate. But even assuming that the trustees are right in their contention that the case is within sect. 351 of the Act of 1845, we submit that the exemption in that section does not apply to the general purposes rate created by the Act of 1865. By sect. 276 of the Act of 1845, premises in a district not lighted and watched are exempted from the rate imposed by that Act; while in sect. 52 of the Act of 1865, premises although n such a district are described as rateable property. Reliance may be placed on sect. 53 of the Act of 1865, which enacts that the provisions of the Act of 1845 relating to the "making, collecting, or recovering of rates, and to appeal against the same," shall extend to the general purposes rate. But this does not incorporate the provisions as to exemption from rates. When the Legislature intended to incorporate an exemption from rates, this was always done in express terms, as is shown by sect. 53 of the Belfast Borough Extension Act, 1853, and sect. 14 of the Belfast Award Act, 1864. The question, however, is in fact concluded by the decision of this Court in the cases of *Cunningham* v. *The Belfast Corporation*, and *M'Causland* v. *The Same* (1). It was held in those cases that although by sect. 6 of the Belfast Borough Extension Act, 1853, demesnes of not less than forty acres were exempted from the police rate leviable under the Act of 1845, they were liable to the general purposes rate; the *ratio decidendi* being that the exemptions from the police rate did not apply to the general purposes rate, the latter being leviable on all hereditaments capable of being rated.

S. L. Brown, K.C., and *James Henry*, for the trustees of the Belfast Central Mission:—

Having regard to the decision in the unreported cases of *Cunningham* v. *Belfast Corporation* and *M'Causland* v. *Same* (1), which have been cited here, but were not cited at the hearing before the Recorder, we do not press the claim to exemption from the general purposes rate.

As to the police rate, we submit that the premises are exempt.

(1) See note, *post*, p. 450.

It is not necessary, in order to bring the case within sect 351 of the Act of 1845, that the building should be erected and used exclusively for public worship. The express use of the word "exclusively" in the second branch of the section, shows that in cases within the first branch the user need not be exclusive. It is sufficient if the main purpose is for public worship. That was a question of fact for the Recorder. He has found that the building was erected and used for public worship, and the finding is sustained by the evidence. It was necessary to obtain the license under the Public Health Act, 1890, as otherwise the holding of cinematograph exhibitions would have been illegal. [Madden, J.—The premises are licensed for marriages. Are not certain conditions necessary to entitle to such license?] The building must be a place of religious worship, and used by persons during one year at least as their usual place of public religious worship: 7 & 8 Vict. c. 81, s. 27.

Ronan, K.C., in reply.

LORD O'BRIEN, L.C.J.:—

This case involves a short point not altogether unimportant. There were two points originally, but one of these is admitted to be concluded by authority. The point remaining depends on the meaning of section 351 of the Belfast Improvement Act, 1845 (8 & 9 Vict. c. cxlii), namely, whether a certain hall in Belfast, called the Grosvenor Hall, is exempt from a rate under that Act, known as the police rate. The section enacts as follows:—"Provided always and be it enacted, that no person shall be rated for or in respect of any church, chapel, meeting-house, or other building erected and used for public worship." The subsequent part of the section, to which I shall refer later on, throws, I think, some little light on the matter. The question is, Was this a building erected and used for public worship?

We are told by the learned Recorder what the user of this building was. He sets out in his order as follows:—"The Grosvenor Hall premises consist of (*a*) a large hall capable of accommodating 2500 people; (*b*) an annexe to same; (*c*) another room which may be called an office. When these premises were

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built, their primary object was to provide a large audience-chamber for religious services; and such services have been since, and still are, the main object of the buildings, and as such are first mentioned in the Annual Report, p. 20. These premises constitute in all essential respects a Methodist Church, except so far as some of the facts herein specially found may be held to modify or destroy in whole or part their character as such, *e.g.* they are licensed for the celebration of marriages, and marriages are celebrated in them. Baptism and Communion are administered, and there is a regular Church membership of 700 to 800 persons, and two stated clergymen. Public religious services are held twice every Sunday in summer, and thrice in winter." The Recorder subsequently states in his order that he was of opinion that the building was erected and used for public worship within the meaning of sect. 351. That is enough for me. I require to go no further. The question was one of fact for the Recorder. He has decided, and, in my opinion, rightly decided, that the building was erected and used for public worship. If indeed there was no reasonable evidence on which he could have acted in so finding, we could quash his order, but, in my opinion, there was abundant evidence to justify his finding.

Mr. Ronan contended that the premises lost their character as a place of worship because occasional entertainments are permitted. The user in this respect, however, is of a trivial nature, and not such as to affect the general character of the premises as a place of public worship. Reliance has been placed on the fact that the premises are licensed for cinematograph exhibitions. But, on the other hand, as my brother Madden pointed out during the argument, they are licensed for the celebration of marriages, and to obtain a license for this purpose, it is necessary that the building should be used as a place of public religious worship.

It is to be observed that the words "used," and "exclusively used," are to be found in sect. 351 of the Act. In the part of the section applicable to the present case, which I have read, the word is "used." In the subsequent part, dealing with buildings used for the gratuitous education of the poor, or purposes of public charity, the words are "exclusively used." I think, therefore, that it is plain that, in order to bring a case within the exemption

contained in the first part of the section, it is sufficient that the erection and user should be mainly and principally for public worship.

As to the second point, dealing with the liability to the general purposes rate imposed by the Belfast Borough Act, 1865, the right to exemption from this was very properly not pressed by Mr. Brown.

MADDEN, J.:—

This case comes before us on an application to quash the order of the learned Recorder of Belfast, who has adopted the convenient course, sanctioned by this Court in the case of *The King* v. *Justices of Antrim* (1), of making what is known as a speaking order setting out the facts in detail, so that the Court has jurisdiction to inquire whether the facts, so set forth, warrant the decision of the Recorder.

The question in this case has narrowed itself down to the consideration of one point only, viz., whether this Grosvenor Hall comes within the exemption in sect. 351 of the Belfast Improvement Act, 1845. The section has been read by my Lord, and I shall read only the part with which we are concerned: "erected and used for public worship." Does the Grosvenor Hall come within this description? The answer to this question depends on the determination of a matter of fact. This hall had its origin in a trust deed. This deed is not set out in the order of the Recorder, but the parties have properly admitted it for our consideration. It is dated the 29th March, 1894, and the uses, intents, and purposes declared by it are as follows:—"Upon trust that the said premises shall be used and occupied in connexion with the City Mission carried on in the City of Belfast by the society of people called Methodists in the connexion established by the late Rev. John Wesley, A.M., in such manner as the said trustees shall determine."

The question is, What was, as a matter of fact, determined by the trustees? My Lord has read the statement of the facts set forth in the order of the Recorder, and I shall advert to what I

(1) [1906] 2 I. R. 298.

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regard as the cardinal matters. The primary object was to provide what is called an audience-chamber for religious services, and such services have been since held, and still are the main object of the buildings. The hall constitutes, in all essential respects, a Methodist Church. There are two stated clergymen. The premises are licensed for the celebration of marriages. The conditions which must exist before a building can be licensed for the celebration of marriages are set out in sect. 27 of 7 & 8 Vict. c. 81, and are as follows:—"Any proprietor or trustee of a separate building, being a place of religious worship, may apply to the registrar of the district in order that such building may be registered for solemnizing marriages therein, and in such case shall deliver to the registrar a certificate, signed in duplicate by two householders at least, that such building has been used by them during one year at the least as their usual place of public religious worship, and that they are desirous that such place should be registered as aforesaid, each of which certificates shall be countersigned by the proprietor or trustee by whom the same shall be delivered." When I read the trust deed, I find that the uses of this building are to be determined by the trustees; and when I turn to the Act of Parliament, which I have quoted, I find that a license for the celebration of marriages could not have been obtained unless the trustees had joined in a certificate that the building had been used as a place of public religious worship. To my mind this is conclusive as to the determination of the trustees. As a matter of fact this hall was used as a place of public worship, and there is no evidence that the congregation had any other place of worship.

Mr. Ronan and Mr. Harrison have relied on a special circumstance in this case, and as against the license for marriages they set up another license. It appears that an application was made by the trustees of this hall under a section of an Act of Parliament (sect. 51 of the Public Health Amendment Act, 1890) dealing with the regulation of places ordinarily used for public dancing or music, or other public entertainments of the like kind; and that they obtained a license for cinematograph exhibitions. It appears to be in accordance with the principles of the Methodist Church that a building used as a church may also be used for

secular purposes. This being so, the action of the trustees in obtaining this license was for the laudable object of regularizing a use of the premises which might otherwise have been illegal. Having regard to the circumstance that this church is not consecrated or dedicated exclusively for religious worship, I cannot hold that the conclusion should be drawn that the building ceased to be used for public worship because the trustees have legalized these cinematograph exhibitions by obtaining the license required by the statute.

On these grounds, I am of opinion that the learned Recorder was, on the facts of the case, right in holding that the premises were exempt from the rate imposed by sect. 348 of the Belfast Improvement Act, 1845.

I do not rest my judgment on the word "exclusively," used in the latter part of sect. 351, because it appears to me that this word is employed for the purpose of the particular exemption there dealt with, viz., any building exclusively used for the gratuitous education of the poor, or for the purposes of public charity. Unless the building was exclusively so used—if a profit was made out of it—it would not be exempt as a charity, as is shown by the case of *The Trustees of Magee College* v. *Commissioner of Valuation* (1), which followed a series of English decisions. The matter is not of much significance, but I think that the word "exclusively" in the section is used, not in relation to what goes before, but with regard to the particular exemptions in the latter part of the section.

WRIGHT, J., concurred.

Solicitor for the prosecutors: *A. J. Lewis.*

Solicitors for the Trustees of the Belfast Central Mission: *Wheeler & M'Cutcheon.*

J. G. T.

(1) I. R. 4 C. L. 438.

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NOTE.

QUEEN'S BENCH DIVISION, 25th April, 1900.

Before ANDREWS, GIBSON, and KENNY, JJ.

CUNNINGHAM, APPELLANT; THE LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST, RESPONDENTS. M'CAUSLAND, APPELLANT; SAME RESPONDENTS.

These were cases stated under 20 & 21 Vict. c. 43.

Summonses had been issued against the appellants, claiming certain sums payable as general purposes rate under the County Antrim and Belfast Borough Act, 1865. The cases were heard by the justices at petty sessions. It was admitted that the necessary formalities for striking the rate had been complied with, and the only question was whether or not the appellants were entitled to exemption on the ground that the property rated in each case constituted a demesne not less than 40 acres in extent, within the meaning of sect. 6 of the Belfast Borough Extension Act, 1853. The justices held that the lands were not demesnes within the meaning of the section, and were therefore liable to the rate. On the requisition of the respective appellants they stated the present cases, setting out particulars as to the nature, extent, date of acquisition, &c., of the lands in question in each case, and seeking the opinion of the Court as to whether or not they were correct in point of law in their decision.

Ronan, Q.C., Gordon, Q.C., and *Chambers*, for the appellants in *Cunningham's Case.*

Hume, Q.C., and *Chambers*, for the appellants in *McCausland's Case.*

Campbell, Q.C., Harrison, Q.C., and *Watts*, for the respondents in both cases.

ANDREWS, J.:—(1)

These cases may be conveniently disposed of together. The facts appear from the cases stated by the justices. In *Cunningham's Case* the only rates in dispute are the general purposes rate (£24 19*s.* 11*d.*) and the special rate (8*s.* 9½*d.*), which is to be dealt with as part of the general purposes rate.

In *McCausland's Case* the only rates in dispute are the police rate (£6 16*s.* 8*d.*), which not very appropriate name is used to describe the rate under the Belfast Local Act, 8 & 9 Vict. c. cxlii, which I shall refer to as the Act of 1845); the general purposes rate (£20 18*s.* 6*d.*); and the special

(1) The judgments are taken from a report which had been furnished to the Belfast Corporation by the late Mr. A. E. R. Joynt, Barrister-at-Law, then reporting in the Queen's Bench Division for the Incorporated Council of Law Reporting for Ireland.—REP.

rate (2*s.* 10½*d.*), and the district sewers rate, both of which are to be dealt with as parts of the general purposes rate.

The police rate in *McCausland's Case* has, as it now appears, been assessed solely in respect of buildings not used for husbandry only, so that no question arises in relation to it upon the exemption in respect of arable meadow, pasture or woodland, or any stable or building used for the purposes of husbandry only, contained in the 348th sect. of the Act of 1845; and as regards the claim of exemption under the 6th sect. of the Belfast Borough Act, 16 & 17 Vict. c. 114 (which I shall refer to as the Act of 1853), the "demesne" referred to in that section is, in my opinion, a then existing demesne of not less than 40 acres, and as McCausland's property contained only 32A. 0R. 5P. up to 1865, his claim of exemption under that section in my opinion fails.

No police rate is claimed in *Cunningham's Case*, inasmuch as his property, not being within a lighted and watched district, is exempt under the 276th sect. of the Act of 1845.

The general purposes rate did not exist until 1865, when it was made leviable from the occupiers of all rateable property within that part of the borough which was in the county of Antrim, by the 51st sect. of the Belfast Local Act, 28 & 29 Vict. c. clxxxiii (which I shall refer to as the Act of 1865), by which the then borough of Belfast was separated for certain purposes from the county of Antrim. By the Belfast Local Act, 31 & 32 Vict. c. cxvii (which I shall refer to as the Act of 1868), the same borough was also separated for certain like purposes from the county of Down; and, by the 14th section thereof, the Belfast Corporation in making the estimate for the general purposes rate referred to in sect. 50 of the Act of 1865, were to include the additional and similar purposes mentioned in sect. 14 of the Act of 1868, and by section 15 of the Act of 1868, they were empowered, in striking any general purposes rate under the Act of 1865, to include therein all rateable property within that portion of the borough situate in the county of Down.

The reasons why it was considered expedient thus to separate the borough of Belfast from the counties of Antrim and Down, in which it was comprised, are shown by the preambles of the Acts of 1865 and 1868, from which it appears, amongst other things, that the duties and powers of the Corporation of Belfast, and the Grand Juries of Antrim and Down, respecting the roads and bridges in the borough, from time to time under their respective jurisdiction and control, were undefined, and that embarrassment and inconvenience resulted therefrom, and accordingly it was expedient that the entire liability for the construction, repair, and maintenance of roads and bridges within the borough should be imposed on the property within the borough exclusively, and also that such property should be relieved from the payment of any county cess for the construction, repair, or maintenance of roads or bridges outside the borough, and further that it would be for the benefit of the counties and the borough if provision were made (as it was thereby) to

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determine the amount to be contributed to the counties by the borough for certain specified county at large and other purposes.

Amongst the provisions rendered necessary by the separation, the Corporation were accordingly required by the 50th section of the Act of 1865, to estimate in each year the amount required for, amongst other things, the contribution so referred to, and the maintenance, repair, and improvement of the streets, roads, and bridges within the borough; and by the 51st section they were empowered to make a rate to meet the amount so required, and to be called the general purposes rate, "upon the occupiers of all rateable property within the borough according to the annual value of the same." Under the Acts of 1865 (sect. 5) and 1868 (sect. 6) levying county cess "on any rateable property within the borough" ceased.

Now the ground of my decision in these cases, as regards the general purposes rate, is the construction which I put on the words "all rateable property" in the 51st sect. of the Act of 1865, and the 15th sect. of the Act of 1868. It has been argued that these words are restricted so as not to include the property in respect of which the defendants in these cases have been rated, and especially so as in each case the rated property (as it has been argued) constitutes and comes within the exemption of a "demesne" in the 6th sect of the Act of 1853, which was passed upon the extension of the borough in that year. I do not think it necessary, having regard to the view I take of the construction in the 51st and 15th sects., which I have referred to, of the words "all rateable property," to determine whether the property in question in each of these cases comes within the meaning of "demesne" in the 6th sect. of the Act of 1853 or not; for, in my opinion, the words "all rateable property" in the 51st sect. of the Act of 1865, and the 15th sect. of the Act of 1868, clearly mean all property of such a character as to be capable of being rated, which the property in each case was and is. It was previously rated to county cess, from which it has been relieved. If it can be properly held to be "demesne," it required the 6th sect. of the Act of 1853 to exempt it from the rates then leviable; and I can see no reasonable ground for exempting it from the general purposes rate, a large part of which is required to provide for what the county cess had previously provided for. It would certainly appear to be more than strange if the legislation which relieved this property from county cess also exempted it from a rate the purpose of which largely included those for which county cess had been levied. We were referred to sections in the Act of 1845, such as the 353rd, with a view to show the restricted sense which it was argued that the words "all rateable property" must bear in them; but the construction of these words, in a particular context, in the Act of 1845, in no way determines their construction in the wholly different Acts of 1865 and 1868, which were passed for effecting purposes which neither the Act of 1845, nor any of the Acts prior to 1865, dealt with, or even contemplated.

I have only to add that the 9th sect. of the Belfast Corporation Act, 1896, which was also relied on for the defendants, does not, in my opinion, in any way affect the question, if the construction I put on the words "all rateable property" in the 51st sect. of the Act of 1865, and the 15th sect. of the Act of 1868, is correct; and the result of my judgment is that, upon the facts found in the cases as originally stated, and the further facts found by the justices since the cases were remitted to them by the Orders of 12th December, 1899, the justices were correct in point of law in their determination in each of the cases, and that, speaking for myself, their determinations ought to be affirmed upon the grounds on which my judgment is based; and that the defendants respectively should pay to the complainants all costs of and incident to the cases stated and the arguments thereon, except the costs which, by the Orders of 12th December, 1899, the parties respectively were ordered to abide.

GIBSON, J.:—I agree. Any doubt in my mind is dispelled by the second paragraph of sect. 52 of the Act of 1865, in which the word "rateable" cannot bear the meaning which has been argued by counsel.

KENNY, J.:—I concur.

IRISH INSURANCE COMMISSIONERS, APPELLANTS; HAMILTON RESPONDENT (1).

Justices — Jurisdiction — Summary Conviction — Offence under National Insurance Act, 1911—*Application of Petty Sessions (Ireland) Act*, 1851—*Statute—Construction—Incorporation, rejecting inconsistent provision—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *sect.* 69, *sub-sect.* 2—*Fines Act (Ireland)*, 1851, *Amendment Act*, 1874 (37 & 38 *Vict. c.* 72), *sect.* 5—*Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 42.

Justices at petty sessions have jurisdiction to hear a complaint for an offence under sect. 69, sub-sect. 2, of the National Insurance Act, 1911, and the procedure prescribed by the Petty Sessions (Ireland) Act, 1851, applies to such offence.

The sub-section above referred to enacts that an employer who has failed to pay a contribution which he is liable to pay under the Act shall be liable "on summary conviction" to a fine as therein mentioned. Sect. 5 of the Fines Act (Ireland), 1851, Amendment Act, 1874, provides that where by an Act then in force or thereafter to be passed it is enacted that offences may be

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prosecuted in a summary manner, they may be prosecuted with respect to parts of Ireland other than the police district of Dublin Metropolis, before a justice or justices of the peace at petty sessions, subject and according to the provisions of the Petty Sessions (Ireland) Act, 1851. Section 42 of the last-mentioned Act declares that its provisions shall not be applicable to complaints under any of the Acts relating to Her Majesty's revenue of excise or customs, stamps, taxes, &c.

Held that, even assuming the National Insurance Act of 1911 to be within the description of the Acts referred to in sect. 42 of the Petty Sessions Act, the effect of sect. 69 of the Act of 1911, taken in conjunction with sect. 5 of the Act of 1874, was to incorporate with the Act of 1911 all the provisions of the Petty Sessions Act, except the 42nd section, in the same way as if there had been a provision that, notwithstanding the 42nd sect. of the Petty Sessions Act, the procedure prescribed that Act should apply to offences in Ireland within sect. 39, sub-sect. 2, of the National Insurance Act, 1911.

Quaere, Is the National Insurance Act, 1911, within the class of Acts referred to in sect. 42 of the Petty Sessions Act?

CASE STATED under 20 & 21 Vict. c. 43.

At a petty sessions held in and for the petty sessions district of Newtownmountkennedy, county Wicklow, the respondent was charged as defendant in a summons in which the appellants were complainants, for that he, the defendant, being the employer of one Thomas Whelan, an employed contributor within the meaning of the National Insurance Act, 1911, did on the 16th day of September, 1912, fail to pay a contribution of fivepence-halfpenny, which under the said Act and the regulations thereunder he was liable to pay in respect of the said Thomas Whelan for the week commencing the 9th day of September, 1912.

It was admitted that the said Thomas Whelan was, on the 16th day of September, 1912, and at all material times, an employed contributor within the meaning of the National Insurance Act, 1911, employed by the defendant. His wages were paid weekly, and one week's wages were paid by the defendant to the said Thomas Whelan on the 16th day of September, 1912, in respect of the week then ending. No contribution within the meaning of the said Act was paid by the defendant by affixing a stamp to the card of the said Thomas Whelan in respect of the week so ending. A copy of the regulations made under sects. 7 and 65 of the Act was given in evidence.

The defendant contended that there was no jurisdiction in the justices to hear the complaint.

The justices were of opinion that they had no jurisdiction, and made an order that the case should be struck out and marked "no jurisdiction." On the application of the complainants they stated the present case, requiring the judgment of the Court as to whether they were correct in point of law in their determination.

The Attorney-General (*Molony, K.C.*) (with him *R. J. Sheehy*), for the appellants:—

The justices at petty sessions had jurisdiction. The complaint is in respect of an offence under sect. 69, sub-sect. 2, of the National Insurance Act, 1911. That sub-section provides that the person guilty of the offence shall be liable to the fine therein mentioned "on summary conviction." We submit that these words necessarily imply that the proceedings are to be taken before justices of the peace in a summary manner, and in accordance with the provisions of the Petty Sessions (Ireland) Act, 1851. In *The Queen* v. *Unkles* (1), the summons charged an offence under sect. 4 of the Ballot Act, 1872, which, by that section, was made punishable on summary conviction before two justices of the peace. It was held by Barry, Fitzgerald, and O'Brien, JJ., Whiteside, C.J., dissenting, that the procedure prescribed by the Petty Sessions Act, 1851, applied. The question raised in that case, as to the application of the Petty Sessions Act to offences created by subsequent enactments not expressly incorporating its provisions, was put beyond all doubt by sect. 5 of the Fines Act (Ireland), 1851, Amendment Act, 1874, which provides that where, by any Act then in force or thereafter to be passed, it is enacted that offences may be prosecuted in a summary manner, such offences may be prosecuted, with respect to parts of Ireland other than the police district of Dublin Metropolis, before a justice or justices of the peace sitting at petty sessions, subject and according to the provisions of the Petty Sessions Act, 1851. This provision covers the present case. The words in sect. 69, sub-sect. 2, of the National Insurance Act, 1911, "on summary

(1) I. R. 8 C. L. 50.

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conviction," are equivalent to a declaration that the offence may be prosecuted "in a summary manner." A summary conviction is a conviction before a Court of summary jurisdiction, or, in other words, one under the Summary Jurisdiction Acts: Stroud's Judicial Dictionary, vol. iii, p. 1982. A Court of summary jurisdiction means a justice or justices of the peace to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland: Interpretation Act, 1889, sect. 13, sub-sect. 11. The expression "Summary Jurisdiction (Ireland) Acts" means, as respects any part of Ireland other than the police district of Dublin Metropolis, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same: *Ib.*, sect. 13, sub-sect. 9. Putting out of the question cases of contempt of Court, justices of the peace constitute the only tribunal competent to impose a fine on summary conviction. If the respondent's contention were to be upheld, the Act of 1911 would be reduced to a dead letter. It has been held in England that the justices have jurisdiction in offences under the section: *Rex.* v. *Baggally* (1).

Ronan, K.C., and *Gustavus Hamilton* (with them *Blood, KC.*), for the respondent:—

The summary jurisdiction of justices is derived entirely from statute. There must be either an express provision making the offence triable by justices, or it must clearly appear from the statute that this was intended. The cases of *Cullen* v. *Trimble* (2) and *Johnson* v. *Colam* (3), cited in Paley on Summary Convictions, p. 16, and in O'Connor's Justice of the Peace, p. 41, as instances in which such jurisdiction was implied, are much stronger than the present. In those cases, as also in *The Queen* v. *Unkles* (4), there was express reference in the statute to proceedings before *justices*. There is no mention of justices in sect. 69 of the National Insurance Act, 1911; nor does that section contain any of the expressions used in sect. 5 of the Fines Act (Ireland), 1851, Amendment Act, 1874, or defined by sect. 13 of the Interpretation Act, 1889. This is a

(1) [1913] 1 K. B. 290.
(2) L. R. 7 Q. B. 416.
(3) L. R. 10 Q. B. 544.
(4) I. R. 8 C. L. 50.

taxing enactment and a penal enactment, and should be construed strictly. But even assuming that the present case would come within the words of the Fines Act, it is excluded from the Petty Sessions Act by sect. 42, which makes that Act inapplicable to complaints under Acts relating to the revenue, or stamps or taxes. The Act here relates to all these. *Rex* v. *Baggallay* (1) was decided upon the construction of the English Summary Jurisdiction Acts, which differ materially from the Irish. In that case it was held that the offence could be dealt with by the justices under their summary jurisdiction, but the argument for the Crown, and the decision of Lord Alverstone, C.J., were expressly based on the language of sect. 51, sub-sect. 1, of the English Summary Jurisdiction Act, 1879, which enacts that where in any future Act any offence is authorized to be prosecuted summarily, or *on summary conviction*, the Summary Jurisdiction Acts shall apply. There are no words like these in any Irish enactment. Moreover, sect. 35 of the English Summary Jurisdiction Act of 1848, which had contained provisions similar to those in sect. 42 of our Petty Sessions Act, was subsequently replaced by sect. 53 of the Summary Jurisdiction Act, 1879, which made the Summary Jurisdiction Acts applicable to proceedings under statutes relating to the revenue.

Sheehy and the *Attorney-General* in reply.

The National Insurance Act, 1911, is not an Act relating to revenue, stamps, or taxes, within the meaning of sect. 42 of the Petty Sessions Act. Its object is not to raise revenue, but to establish a system of compulsory thrift. The moneys received by the Insurance Commissioners are not applied for the benefit of the State, but are handed over to the approved societies. The stamps are used only as a convenient system of book-keeping. Section 7 shows that the use of stamps is not compulsory, and that the Insurance Commissioners could make regulations for the payment of contributions by means other than stamps. The statute does not relate to taxes. A tax is defined in the Oxford Dictionary as "a compulsory contribution to the support of Government."

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When taxes are generally spoken of, they mean Parliamentary taxes given to the Crown: Holt, C.J., *Brewster* v. *Kidgill* (1); Stroud's Judicial Dictionary, vol. iii, p. 2011. [They also referred to the National Insurance Act, 1911, sect. 108; Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), ss. 65–84; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 21, 36, 39; Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), sect. 26; Stamp Act, 1891 (54 & 55 Vict. c. 39), sect. 121.]

Blood, K.C.:—

A compulsory contribution enforceable by statute is a tax. The regulations made under the National Insurance Act provide for payment of contributions by stamps, and by no other means. [He referred to *The King* v. *Scott* (2).]

May 8.

PALLES, C.B.:—

The question for determination is whether justices in petty sessions have jurisdiction, by reason of sect. 69, sub-sect. 2, of the National Insurance Act, 1911 (3), to hear and determine a complaint that the employer of an employed contributor failed to pay a contribution of 5½*d.* which, under the Act and the Regulations made thereunder, he was liable to pay in respect of the employed contributor.

The enactment, sect. 69, sub-sect. 2, is:—"If any employer has failed to pay any contribution which under this part of this Act he is liable to pay in reepect of an employed contributor . . . he shall be liable *on summary conviction* to a fine not exceeding £10; and when the offence is failure or neglect on the part of the employer to make any such contribution, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay."

The answer, therefore, to this question must depend on the meaning to be put, in reference to proceedings in Ireland, upon the words "on summary conviction."

There is no doubt that, as applied to England, these words,

(1) 12 Mod. 167.
(2) 3 T. R. 602.
(3) 1 & 2 Geo. 5, c. 55.

taken in connection with sect. 51 (1) of the English Summary Jurisdiction Act 1879, give jurisdiction to justices in the manner provided by the Summary Jurisdiction Acts in that country, and that those Acts apply accordingly: *Rex* v. *Baggalay* (2). But none of those Acts are in force in Ireland; and the difference between those Acts, and the Summary Jurisdiction Acts in Ireland, appears not to have attracted the attention of the draftsman, as the Act does not contain the usual interpretation clause in reference to the application to Ireland of words *prima facie* applicable to Courts in England.

The meaning, however, of the words used is, to my mind, quite clear without any interpretation clause.

The principal Act, in this country, in relation to procedure by summary jurisdiction, is the 14th and 15th Vict. cap. 93, which was passed in 1851. In *The Queen* v. *Unkles* (3) a question arose as to the application of that Act to prosecutions for offences created by statutes passed subsequently to it. The decision there of that question in the affirmative was not a unanimous one; but in the next session of Parliament a statute was passed which, to my mind, determines the question here. It is the Fines Act (Ireland), 1851, Amendment Act, 1874 (4), the 5th sect. of which is in these words:—

"Where in any Act now in force or *hereafter to be passed* it is enacted that penalties, offences, or proceedings thereunder may be recovered, prosecuted, or taken *in a summary manner*, and no further provision with respect thereto is contained in such Act, then such penalties, offences, and proceedings shall be recoverable, may be prosecuted or taken . . . with respect to parts of Ireland other than the police district of Dublin Metropolis" before "a justice or justices of the peace sitting in petty sessions, subject and according to The Petty Sessions (Ireland) Act, 1851, and any Act amending the same."

I cannot doubt that the words of sect. 69 of the Act of 1911, providing that the offence in question here is punishable *on summary conviction*, amount to an enactment that the offence

(1) 42 & 43 Vict. c. 49.
(2) [1913] 1 K. B. 305.
(3) I. R. 8 C. L. 57.
(4) 37 & 38 Vict. c. 72.

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may be prosecuted "in a summary manner"; and as that Act does not contain any further provision with respect to such prosecutions, that the 5th section of the Act of 1874 applies, and that the two Acts of 1874 and 1911 taken together amount to an express provision that the offence here is cognizable by justices in petty sessions, subject and according to the Petty Sessions Act, 1851.

The learned counsel for the respondent here insist that, even if that be so, the present prosecution is a complaint under an Act relating to "stamps" or "taxes"; and that sect. 42 of the Petty Sessions Act, 1851, excludes from its operation proceedings under certain classes of Acts, of which those relating to stamps or taxes are some.

Section 108 of the Act of 1911 enacts that the Commissioners of Inland Revenue may by regulations provide for applying, with the necessary adaptations, as respects such stamps as may be required for the purposes of the Act, "all or any of the provisions (including penal provisions) of the Stamp Duties Management Act, 1891, as amended by any subsequent Act"; and undoubtedly this latter Act does provide, for offences under that Act, a mode of proceeding different from that prescribed by the Petty Sessions Act, 1851.

I think it unnecessary to enter upon the question whether the Act of 1911 is or is not within the description of Acts in respect of complaints under which sect. 42 renders the procedure under the Act of 1851 inapplicable; because, even assuming that it is (which I by no means determine), I am of opinion that sect. 69 of the Act of 1911, taken, as it must be, in conjunction with sect. 5 of the Act of 1874, expressly enacts that the new procedure prescribed by the Petty Sessions Act of 1851 shall be applicable to such a prosecution as the present, and consequently that it cannot incorporate the 42nd sect. of that Act, which is inconsistent with such an enactment. I hold therefore that the effect of that 69th sect. is to incorporate with the part of the Act in which it occurs all the provisions of the Act of 1851, except its 42nd sect., and such other parts of it, if any, as negative the application of the procedure prescribed by it. The effect, in my opinion, is the same as if there were a provision in the Act of 1911, that, notwithstanding sect. 42 of the Petty Sessions Act of

1851, the procedure prescribed by that Act shall apply to offences in Ireland within sect. 69, sub-sect. 2.

The case must, therefore, be remitted to the justices, with declarations: (1) that they were not correct in their determination; and (2) that they had jurisdiction to hear and determine the complaint; and with a direction that they proceed to hear and determine it, and to do therein as to justice shall appertain.

KENNY, J., concurred.

Solicitor for the appellants: *John F. Culhane.*
Solicitors for the respondent: *Hamilton & Craig.*

J. G. T.

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June 5.

HUMPHREY (Surveyor of Taxes), Appellant; PEARE, Respondent (1).

Revenue—Income tax—Negotiation fee paid to agent on sale under Land Purchase Acts—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sch.* D.—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 23, *sub-s.* 12.

The agent of an estate intended to be sold to the tenants under the provisions of the Irish Land Act, 1903, was employed by the vendors to negotiate the sales, under an agreement by which he was to receive out of the purchase-money a commission of 3 per cent. on the amount of the same, and this agreement was sanctioned by the Estates Commissioners under s. 23, sub-s. 12, of the Act. The estate was sold and amount of the commission paid to the agent out of the purchase-money.

Held, that the commission was part of the annual gains and profits of the agent arising from his vocation as such agent, in respect of which he was assessable to income tax.

Case Stated pursuant to sect. 59 of the Taxes Management Act, 1880, for the opinion of the High Court of Justice in Ireland. The case set out as follows:—

"1. At a meeting of the Commissioners for the special purposes of the Income Tax Acts, held at the Court House, Clonmel, Co. Tipperary, Ireland, on the 12th day of September, 1912, C. H. Peare of Carrick-on-Suir (hereinafter called the respondent) appealed against three several assessments under Schedule D of the Act 16 & 17 Vict. c. 34, respectively made upon him, namely (1) an assessment hereinafter referred to as No. 1 assessment, in the sum of £148; (2) an assessment hereinafter referred to as No. 2 assessment, in the sum of £261; and (3) an assessment, hereinafter referred to as No. 3 assessment, in the sum of £11. Of these three assessments, No. 1 had reference to the year ended the 5th day of April, 1910; No. 2, to the year ended 5th April, 1911, and No. 3, to the year ended 5th April, 1912, and all three were in respect of the profits or

(1) Before Palles, C.B., and Madden and Dodd, JJ.

gains which had been derived by Mr. Peare, the respondent, from fees earned by him and payable to him under sect. 23, sub-sect. 12, of the Irish Land Act, 1903, and by virtue of three several agreements, for his successful negotiations of the sale of certain estates in Ireland under the provisions of the last-mentioned Act, for which estates he was employed as agent by the vendors concerned.

"2. In the case of 'No. 1' estate, the vendors were Mrs. Frances Russell Mulcahy and others. In the case of 'No. 2' estate and 'No. 3' estate, full details have not been supplied by the respondent, but the estates are known, No. 2 as the 'Sadleir' estate, the vendor of which estate was Miss Annie M. Sadleir, and No. 3 as the 'Bradshaw' estate, the vendor of which estate was Mr. Robert Armstrong Bradshaw.

"3. In the case of the estates numbers 1 and 3, the amounts of the assessments, namely, £148 and £11, were the sums put upon the allocation schedules by the express authority of the vendors, and sanctioned by the Estates Commissioners, being 2½ per cent. of the purchase-money in each case respectively; and in the case of the No. 2 estate the amount of the assessment, namely £261, was arrived at in a precisely similar manner, save only that the Estates Commissioners sanctioned in this case a negotiation fee calculated at 3 per cent. of the purchase-money.

"4. The respondent claimed that the full measure of his liability to assessment to income tax in respect of the class of profits or gains sought to be charged with income tax by the said three assessments, was to be found in three sums to be ascertained by calculating at the rate of ½ per cent. of the purchase-money, in place of calculating on the basis of the full amount received, viz., the amounts of the assessments. Of the full amounts received he claimed that ½ per cent. of the purchase-money only was payment to him for work done as negotiator, the major part of such amounts received being compensation to him for the loss of his employment, as agent to the three estates, which resulted from the sales; and he asked, therefore, that in the case of 'No. 1' estate the assessment in the sum of £148, being the full amount that he had received, calculated at the rate of 2½ per cent., should be reduced to £30, being

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calculated at the rate of ½ per cent., and that, calculating in a like manner, the assessment on the 'No. 2' estate of £261 should be reduced to £52, and the assessment on the 'No. 3' estate of £11 should be reduced to £2.

"5. The respondent based his claim, as set forth in the preceding clause, on the judgment delivered by his Honour Judge Moore, at the Court House, Clonmel, on the 23rd day of January, 1912, on his re-hearing, pursuant to sect. 22 of the Income Tax Act, 1853, an appeal brought by the respondent in respect of a precisely similar class of profits or gains to those the subject of this case. The essential facts at such re-hearing were precisely similar to the essential facts in this case, allowing for the difference in names, dates, and unessential details.

"6. The respondent admitted that the three several agreements referred to in clauses 1 and 2 hereof, under which the said fees were payable to him, did not state that any of such fees or portion of such fees were to be paid to him as compensation for loss of his employment, as referred to in Clause 4 hereof. He also admitted that those three agreements were the only agreements or contracts which had been entered into between the vendors of the three estates and himself in relation to the said fees thereby agreed to be paid to him, and subsequently sanctioned by the Land Commission to be paid out of the purchase-moneys of the said three estates.

"7. The respondent put forward no claim to have the said assessments reduced by any sums by way of expenses incurred by him in negotiating the sales of the said three estates.

"8. The appellant, on behalf of the Crown, claimed that the three several assessments should be confirmed in their entirety. He based his claim upon the wording of the three several agreements, which clearly stated that the sums to be paid to the respondent were to be paid to him for his services in negotiating the sales of the three estates. Further, he contended that, were his view in need of support, it was given by the fact that the three several sums of the assessments were in each case the sums which the Estates Commissioners had sanctioned pursuant to the powers vested in them by sect. 23, sub-sect. 12, of the Irish Land Act, 1903, and that no power was given to the

said Estates Commissioners to pay any sum save to an agent employed by a vendor to negotiate the sale of an estate, as part of the costs connected with the sale, and that in law and in fact payment of compensation for loss of employment did not and could not form part of the costs connected with the sale.

"9. There are annexed to and should be read as part of this case—[A number of documents were referred to, including copies of the agreements between the vendors and the respondent in the cases of the Mulcahy estate and the Sadleir estate.]

"10. The respondent has not lodged the agreement or consent of the vendor in the Bradshaw (No. 3) estate, but admits that it is similar in form to the agreement in the Mulcahy estate, which agreement is annexed to this case, and marked (A).

"11. We, the Special Commissioners of income tax who heard the appeal, are of opinion that the contention of the surveyor of taxes, as set forth in paragraph 8 of the case, is correct in law; but in deference to the previous decision of the County Court Judge at Clonmel in a similar case, referred to in paragraph 5, we reduced the three assessments to the sums of £30, £52, and £2 respectively as contended for by the respondent.

"The surveyor of taxes thereupon expressed his dissatisfaction with our determination, as being erroneous in point of law, and duly required us to state and sign a case for the opinion of the High Court of Justice, as to whether income tax to be paid by the respondent should be ascertained by calculating at the rate of ½ per cent. of the purchase-money, or on the full amounts received by the respondent, which case we have now stated, and do sign accordingly."

The agreement above referred to in the case of the Mulcahy estate was as follows:—

"We Frances Russell Mulcahy, of Westminster Mansions, London, widow; Margaret Anne Butler, of 62 Harcourt Street, Dublin, wife of Thomas Butler, Esq., of same place; and John Emanuel Power and Thomas Power, both of East Lodge, Tramore, in the county of Waterford, Esqs., do hereby appoint Charles H. Peare, of Landscape House, Kilsheelan, in the county of Waterford, Justice of the Peace, to act for us in connexion with the negotiations with the tenants on the townland of Ardavullane,

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in the barony of Clanwilliam, and county of Tipperary, for the sale to them under the Irish Land Act of 1903, of their holdings; and, in the event of such sale being successfully carried out, we undertake to pay to the said Charles H. Peare a commission at the rate of 2½ per cent. on the gross purchase-money, such commission to include his remuneration for his assistance in the preparation, completion, and execution of the agreements; also for assisting all necessary surveys and revision of maps, and attendance of inspectors; also in any work necessary to dispose of queries in reference to the purchase by the Estates Commissioners, and generally to assist our solicitors in carrying out the sales so far as may be in his power so to do; and we agree that such commission shall, upon the allocation of the purchase-money of the estate, be paid to the said Charles H. Peare out of funds in Court."

The agreement in the case of the Sadleir estate was in a similar form, except that it provided for a commission of 3 per cent. on the purchase-money.

The Solicitor-General (*Moriarty, K.C.*) (with him *Coll*), for the appellant:—

In the cases decided by Judge Moore, and followed by the Commissioners, he held that so much of the negotiation fee as represented more than ½ per cent. of the purchase-money was not liable to income tax, on the ground apparently that as in cases of sales to the Estates Commissioners only ½ per cent. is allowed to an agent, according to the scale settled by the Estates Commissioners and the Treasury under sub-sect. 11 of sect. 23 of the Irish Land Act, 1903, anything over such ½ per cent., agreed to be paid under sub-sect. 12, is not remuneration for work done, but is compensation for loss of employment as agent. We submit, however, that the whole of this commission is "annual gains and profits" arising from an employment within the meaning of Schedule D of the Income Tax Act, 1853. By the agreement it is expressly made payable to the respondent as remuneration for his work in carrying out the sales. The sum which may be sanctioned by the Estates

Commissioners under sub-sect. 12 is declared to be payable as part of the costs connected with the sale. [He referred to *Blackiston* v. *Cooper* (1).]

Sealy, for the respondent :—

The negotiation fee is really intended in these cases as not merely remuneration for work done, but also compensation for loss of employment. The words in the agreement are that the commission is "to include" remuneration for the work done. This does not prevent it including other matters, such as compensation for loss of employment. If ½ per cent. is deemed by the Treasury sufficient as remuneration for work done in the case of a sale to the Estates Commissioners, the balance here may be taken to be in the nature of compensation.

PALLES, C.B. :—

This money was paid as commission incident to services performed in relation to the carrying out of a contract for sale, and is therefore part of the annual gains and profits of the agent arising from his vocation as such agent.

Therefore the *opinion* of the Special Commissioners of Income Tax was correct. They acted, however, and very properly acted, in deference to the decision of Judge Moore, and against their own opinion. We must hold that their *decision* was wrong, and should be reversed.

MADDEN and DODD, JJ., concurred.

Solicitor for the appellant: *The Solicitor of Inland Revenue.*
Solicitors for the respondent: *Kenny and Stephenson.*

J. G. T.

(1) [1909] A. C. 104.

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PATRICK BRITTON *v.* THE COUNTY COUNCIL OF THE COUNTY OF TIPPERARY (SOUTH RIDING) (1).

Local Government—Road materials taken by county surveyor—Right of owner to sue for value—Grand Jury Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162—*Local Government* (*Adaptation of Irish Enactments*) *Order*, 1899, *Sch.*

The owner of lands cannot maintain an action to recover the value of stones or other materials taken out of the lands by a county surveyor or contractor for the repair of roads, &c., under the provisions of s. 162 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899.

MOTION FOR JUDGMENT.

The action, which was commenced by a civil bill claiming £16 damages, being the value of the stones taken out of the plaintiff's quarry for the repair of roads, was subsequently removed into the King's Bench Division by an order made under 40 & 41 Vict. c. 56, s. 57.

The plaintiff delivered a statement of claim, which set out as follows:—

"1. The plaintiff is a farmer residing at Glenville, Mullinahone, in the county of Tipperary. The plaintiff purchased his holding, consisting of 83A. 1R. 25P., pursuant to the Land Purchase (Ireland) Acts, 1870 to 1891, and same was duly vested in him in fee-simple by order of the Irish Land Commission, dated the 15th April, 1893, and subsequently registered pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891.

"2. During the year 1912 the defendants entered upon the lands of the plaintiff and took from a quarry situate thereon 800 cubic yards or thereabouts of stone for the purpose of using same as material for the repairing of roads in the vicinity of the said lands. The defendants have paid on previous occasions, and are willing to pay in respect of the acts complained of in this action,

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the surface damage thereby occasioned, to be assessed in the manner provided by 6 & 7 Wm. 4, c. 116, s. 162.

"3. The plaintiff claims to be entitled to the actual value of the material so abstracted from the said quarry as aforesaid, as distinct from the surface damage thereby caused, and says 800 cubic yards of stone would weigh approximately 960 tons, and that a fair price to be paid by the defendants therefor would be at the rate of fourpence per ton.

"The plaintiff claims £16, or, in the alternative, £16 damages for the trover and conversion of the said stone."

The defendants, in their statement of defence, admitted the statements in the statement of claim, except in regard to the amount of stones removed, which they said amounted to 772 cubic yards, and the fair price per ton, which they said was one penny three farthings. The defence then went on to say:—

"2. The defendants say that the plaintiff has set out no facts in his statement of claim which give him a cause of action for the value of the stones removed by the defendants.

"3. The defendants say they are entrusted with the care of the roads in the county Tipperary, South Riding. That they repair some roads in the neighbourhood of plaintiff's quarry by direct labour. That the plaintiff's quarry was the most convenient for obtaining material for the repair of said roads. That they, as such road authority, by their county surveyor, in the year 1912, under and by virtue of 6 & 7 Wm. 4, c. 116, s. 162 (now adapted by the Adaptation of Enactments Order, 1899), entered said quarry and took away 772 cubic yards of stones for the repair of said roads. The defendants had a few years previously obtained an order for entering said quarry from the justices of petty sessions, but in the year 1912 this was not necessary, as the plaintiff gave his permission thereto.

"4. The plaintiff has been paid, in respect of the surface damage caused in taking the said 772 cubic yards of stones out of his quarry, the amount awarded by the arbitrators appointed for that purpose, and the defendants say that they are under no liability to pay for the value of the said stones."

The action was tried before Wright, J., without a jury. He reserved his decision, and died without having given judgment.

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The parties thereupon, in order to save the expense of a second trial, entered into a consent, which was made a rule of Court, that the plaintiff and the defendants respectively should be at liberty to apply to the King's Bench Division for judgment; and that in the event of judgment being entered for the plaintiff, the amount to be awarded should be £8.

The plaintiff now moved that judgment should be entered for him for the sum of £8. There was a cross-motion on the part of the defendants that judgment should be entered for them.

W. G. Gibson. K.C. (with him *Robert Kinahan*), for the plaintiff :—

The question is, whether when road materials are taken by a county surveyor or contractor under sect. 162 of the Grand Jury Act, 1836, the owner of the materials can maintain an action for their value. There has been no decision of this Court upon the question, but it has arisen several times before a Judge of Assize on the hearing of a civil-bill appeal, and conflicting decisions have been given. Lawson, J., in *Smyth* v. *M'Ildowney* (1), and Andrews, J., in *Murphy* v. *Macrory* (2), held that an action lay for the value of the materials, while Murphy, J., in *La Touche* v. *Coady* (3), and Johnson, J., in *Caplis* v. *Nolan* (4), held the contrary. We submit that the action lies. Section 162 of the Grand Jury Act, 1836, deals with the mode of providing compensation for surface damage, and declares that the value of the materials is not to be included, that is to say, is not to be included for the purpose of estimating the amount of compensation under the section. But there is nothing in the section precluding the owner from recovering such value in an action. A statute is not to be construed as depriving a person of his property without compensation, unless there are plain words to that effect: *O'Donovan* v. *Kenmare* (5), per Fitz Gibbon, L.J.; *Attorney-General* v. *Horner* (6), per Brett, M.R.; *The Queen* v. *Guardians of Mallow Union* (7), per

(1) 20 I. L. T. R. 244.
(2) 43 I. L. T. R. 242.
(3) 35 I. L. T. R. 44.
(4) 39 I. L. T. R. 256.
(5) [1896] 2 I. R. 512, at p. 525.
(6) 14 Q. B. D. 245, at p. 257.
(7) 12 I. C. L. R. 35, at p. 41.

Lefroy, C.J.; Maxwell on Statutes, 5th ed., p. 461. [He also referred to 5 & 6 Wm. 4, c. 50, ss. 51, 53, 54.]

James O'Connor, K.C., and *Carrigan, K.C.* (with them *Sealy*), for the defendants.—

It is sufficiently clear from the section that the intention was that nothing should be recoverable in respect of these road materials except surface damage, unless in the case of stones or gravel taken from a quarry or gravel-pit, *bona fide* demised with liberty to work the same. In other cases the Legislature evidently considered that the stones or other materials were of little or no value, and might be taken for the public benefit without payment. When the Legislature intended that the value of the materials should be recoverable, it expressly provided for it, as in sect. 14 of the Labourers (Ireland) Act, 1886. [They also referred to 13 Geo. 3, c. 78, ss. 27, 29.]

Kinahan, in reply:—

If the defendants are right, the anomaly would result that if a man takes a lease of a quarry he is entitled to recover the value of the stones taken, but he is not so entitled if he purchases the land in fee-simple.

PALLES, C.B.:—

The question argued is an important one, not only because it is one which so often arises, but because there has been such a remarkable diversity of judicial opinion upon it. Mr. Justice Lawson, in *Smyth* v. *M'Ildowney* (1), and Mr. Justice Andrews in *Murphy* v. *Macrory* (2), have decided in favour of Mr. Gibson's contention; while Mr. Justice Murphy in *La Touche* v. *Coady* (3), and Mr. Justice Johnson in *Caplis* v. *Nolan* (4), have decided to the contrary.

I need not say that there is no Judge of modern times for whose opinion I have a greater respect than Mr. Justice Andrews, and in addition to that we have in the report of *Murphy* v. *Macrory* (2) the reasons for the conclusion he arrived at. This

(1) 20 I. L. T. R. 244.
(2) 43 I. L. T. R. 242.
(3) 35 I. L. T. R. 44.
(4) 39 I. L. T. R. 256.

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shows that we must be careful in considering the case before coming to a decision, but I must say that I have arrived at a very clear conclusion upon it. I have no recollection whether it was argued before me on a civil-bill appeal, as my brother Dodd thinks it was; but if it were, I have no doubt that I decided in accordance with the views of Mr. Justice Murphy and Mr. Justice Johnson, as that has always been my view of the construction of the section.

I agree in much that Mr. Gibson has said. I think it is against the genius of our law that an Act of Parliament should take away a man's property without giving him any compensation, and I agree that it requires affirmative, indeed coercive, words to do so, and I approach the question with that fixed opinion.

I decide entirely on the words of the section, sect. 162 of the Grand Jury Act of 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, without reference to any English Act. That section enacts:—"Every county surveyor and every contractor for any work to be executed in pursuance of a resolution of a county council shall have power and authority to dig for, raise, and carry away in or out of any lands (not being a deer-park, bleach-green, orchard, walled garden, haggard, or yard, or planted walk, lawn, or avenue of a mansion-house), any gravel, stones, sand, or other materials, whether the same be found in the same or any adjoining county, which may be wanted for the building, re-building, enlarging, or repairing any bridge, arch, gullet, pipe, or wall, or for the making, repairing, or preserving any road or footpath. In my opinion, having regard to the entire section, this clause in the section authorizes not only the digging for, raising, and carrying away the specified materials, but also their use in the specified building, rebuilding, enlarging, making, repairing, or preserving.

Now, what are the terms on which the county surveyor or contractor is authorized to do this? It was not without doing something in return that he was given the right. He "shall make such satisfaction for the damage done thereby, or by taking any such materials as aforesaid, as shall be assessed by three substantial householders." That is, it is a power to the county surveyor or contractor to take these materials upon his

making a certain satisfaction; and the Legislature unquestionably did not consider that that was taking a man's property without giving him compensation.

Let us see, then, what that satisfaction is to be, the making of which is the condition upon which this right is given to the county surveyor or contractor. It is, as I read the section, to be such satisfaction for the damage done thereby, or the taking of the materials, as shall be assessed by three substantial householders; and the section goes on to say that these three householders in appraising the damages are *not to include* in their estimate the *value of any stones*, gravel, or other materials, but only the waste committed by breaking the surface and making a passage through the land, unless such stones, gravel, or other materials shall be taken from any quarries and gravel-pits *bona fide* demised with liberty to work the same—an exception that does not apply here.

Thus the Legislature says that this thing may be done upon satisfaction being made for damage by paying a certain amount of money to a particular person. What is the meaning of that? I hold that it is to make lawful that which would otherwise be unlawful—to authorize the taking of these stones, which form part of the freehold of the land, and the applying them in the making of roads or other specified public works within the county, upon a sum to be ascertained in a particular way being paid in satisfaction. I cannot add anything to that. The Legislature may have been right, or it may have been wrong, but what it provided was: "You may do this thing, which would otherwise be wrongful, on paying a certain sum to be ascertained by a tribunal constituted for that purpose."

What is the answer to that *prima facie* view of the section? It has been well put by Mr. Kinahan. He argues that there would be an anomaly in holding that if the stones are taken from quarries which have been *bona fide* demised with liberty to work them, the estimate is to include the value of the stones taken; but if the person who works the quarry is not a lessee, but is the owner in fee-simple of the land, he is not to be paid such value. That no doubt is an anomaly. I agree, however, in the view put forward by Mr. O'Connor, that underlying the

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whole of this section is the idea that stones *in situ*, otherwise than in quarries actually worked, or agreed to be worked, are of no value; and that this exception was introduced for the benefit of a lessee who was working, or was permitted to work, as a trade, an open quarry.

I hold that upon the true construction of the section the Legislature intended what it said, that these stones should be taken upon the terms of compensation being made for a particular thing in a particular way, and if these terms are hard terms in the present state of the country, as distinct from the state in which the country was when the Act of William 4th was passed, we have nothing to do with that. We must simply deal with the Act of Parliament as we find it.

We must give judgment for the defendants.

DODD and MOLONY, JJ., concurred.

Solicitor for the plaintiff: *John A. Kennedy.*
Solicitor for the defendants: *Francis E. Tydd.*

J. G. T.

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Nov. 4, 21.

NATIONAL GAS ENGINE COMPANY, LIMITED, *v.* ESTATE ENGINEERING COMPANY, LIMITED (1).

County Court—Default procedure—Applies where defendants a limited company—Mode of service—"Personally served"—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 59—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 116.

The default procedure provided by s. 59 of the County Officers and Courts (Ireland) Act, 1877, applies to a case in which the defendants are a limited company, and the process prescribed by that section may be served on such defendants by leaving it at, or sending it by post to, the registered office of the company, as provided by sect. 116 of the Companies (Consolidation) Act, 1908.

CASE STATED by Boyd, J., on the hearing of a civil-bill appeal. The facts were set out in the case as follows:—

"This is an appeal from an order of the Right Honourable the Recorder of Dublin, dated the 26th February, 1913, striking

(1) Before KENNY and MOLONY, JJ.

out a default affidavit and process lodged with the Clerk of the Crown and Peace in accordance with the provisions of sect. 59 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). The civil-bill is one for £14 17*s.* 7*d.* for work and labour done, and materials supplied. The defendants are a limited company, whose registered office is No. 12 South Anne Street, in the City of Dublin. The default civil-bill, and the notice prescribed by the said section, were, on the 8th January, 1913, served by George Morgan, civil-bill officer, on Thomas William Storey, one of the directors of the said company, at its said registered office. The service of the said default civil-bill and notice was duly proved in open court by the said George Morgan. The said default civil-bill and notice were also posted in a registered letter addressed to the defendant company at their said registered office. The lodgment of the said default affidavit was (contrary to the usual practice of his office) accepted by the Clerk of the Crown and Peace in pursuance of an arrangement with the plaintiff's solicitor, in order that the point of practice hereinafter mentioned might be raised and determined. On the said default civil-bill coming on for hearing on the 26th February, 1913, there was no appearance for the defendant company, and having heard counsel for the plaintiffs on the point of law involved, the Right Honourable the Recorder struck out the said default affidavit, as he was of opinion that the default procedure provided by sect. 59 of the said Act was not applicable to a case in which the defendants were a limited company, as he held that a limited company cannot be 'personally served' within the meaning of the said section."

The question for the decision of the Court was whether or not the practice adopted by the Recorder was correct in point of law.

Hubert Hamilton (with him *W. G. Gibson, K.C.*), for the plaintiffs :—

The contention of the defendants is that a public company cannot be served personally, and that as sect. 59 of 40 & 41 Vict. c. 56 requires that the default process and notice issued under the section are to be personally served on the defendant, the provisions of the section do not apply where the defendant is a company.

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It is evident, however, that the civil-bill code was intended to apply to public companies: see 14 & 15 Vict. c. 57, sect. 162; 27 & 28 Vict. c. 99, sect. 3. The mode of service on a company was prescribed by sect. 62 of the Companies Act, 1862, repealed, but substantially re-enacted, by sect. 116 of the Companies (Consolidation) Act, 1908, which provides that a document may be served on a company by leaving it at or sending it by post to the registered office of the company; and sect. 285 defines "document" as including "summons, notice, order, and other legal process." These provisions as to service displace, in the case of a company, any previous provisions: *Pearks, Gunston, & Tee, Limited* v. *Richardson* (1); *O'Neill* v. *St. Brigid's Well Co.* (2).

Arthur R. Moore, for the defendants:—

Sect. 65 of 14 & 15 Vict. c. 57 authorizes in ordinary cases either personal service, or some of the other modes of service mentioned, to be adopted. Sect. 59, however, of 40 & 41 Vict. c. 56 requires the service of the default process to be personal, and no alternative form of service is allowed. Personal service cannot be effected where a company is defendant, and such cases are, therefore, not within the section. The section of the English County Court Act (51 & 52 Vict. c. 43, sect. 86) dealing with default procedure commences with the words "subject to any rules and orders made under this Act." By sub-sect. 5 power is given, where personal service cannot be effected, to dispense with such service in the circumstances mentioned therein; and by Order VII, Rules 26 and 32, of the English County Court Rules of 1903 provision is made for the mode of service in case of companies. There is no similar provision by any Irish rule, and in fact such provision would be *ultra vires*. Personal service is necessary, except where expressly dispensed with by statute: *The King* v. *Hall* (3), per Bayley, J. The English Summary Jurisdiction Act, 1848, by sect. 1, and the Petty Sessions (Ireland) Act, 1851, by sect. 12, sub-sect. 3, expressly provide for an alternative mode

(1) [1902] 1 K. B. 91.
(2) [1895] 2 I. R. 442.
(3) 6 Dowl. & Ry. 84, at p. 85.

of service of summonses. As to the meaning of personal service, see Rules of Supreme Court, Ord. IX, Rule 3.

W. G. Gibson, in reply:—

A company being an artificial person, the word "personally," like the word "person," should be given an artificial construction where a company is a defendant. In *The Pharmaceutical Society* v. *London and Provincial Supply Association* (1), Lord Blackburn says:—"I am quite clear about this, that whenever you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly." Substituting the word "personally" for "person" in the above statement by Lord Blackburn, it covers the present case. [He also referred to *Cortis* v. *Kent Waterworks Co.* (2), per Bayley, J., at p. 331; *Reynolds* v. *Enfield Cycle Co.* (3); 8 & 9 Vict. c. 16, s. 135; 8 & 9 Vict. c. 18, s. 134; 38 & 39 Vict. c. 60, s. 21.]

Cur. adv. vult.

Nov. 21.

KENNY, J.:—

The question raised by the special case is whether the default procedure in the County Courts, established by the 59th sect. of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), can be applied in the case of a company defendant, or is merely applicable where the defendant is an individual. The point is an important one—the more so as we were informed at the bar that the County Court Judges in Ireland are somewhat divided in opinion as to the effect of the section. In the action in which the present "Case" was stated the appeal was from a decision of the Recorder of Dublin, who, acting on the course of practice hitherto adopted by him, held that the default procedure could not be directed against a limited liability company.

The preamble of the Act of 1877 states that it is expedient to

(1) 5 A. C. 857, at p. 869.
(2) 7 B. & C. 314.
(3) 3 New Ir. Jur. Rep. 205.

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amend the laws relating (*inter alia*) to the Civil Bill Courts in Ireland, and to extend the jurisdiction of the latter, and the section in question—the 59th—then provides a method of procedure for recovery of liquidated demands without the necessity of resorting to *oral* evidence in proof of the claim. The procedure consists in the filing of an affidavit verifying the debt, and the issuing and service of a process containing a special notice to the defendant that unless he intimates his intention of disputing the debt and defending the suit, the plaintiff may, without further proof than the affidavit that has been so filed, obtain a decree for the amount of his demand. The section enacts that the process and notice are to be *personally* served, and that a decree may be given upon proof of such *personal* service. It is this direction for *personal* service that has led to the controversy—the Recorder in the present case having held that a limited liability company could not be "personally" served within the meaning which is properly attributable to that word in this section. It therefore becomes necessary for the determination of the question before us to refer to the civil bill code—more especially in relation to the provisions as to parties and service of process.

The principal Act governing procedure in the County Court is the Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), the 65th section of which enacts that service of any civil bill process on a defendant shall be effected either by personal service of the process or by leaving a copy thereof at the defendant's house or place of residence, or at his office, warehouse, counting-house, shop, factory, or place of business, with any one of the persons mentioned in the section. No decree is to be granted unless it shall be proved that the house or place of residence, office, &c., is situate within the division of the county in which the defendant is required to appear.

The 35th sect. of the Act gives jurisdiction to hear and determine by civil bill all disputes and differences "between party and party" for any sum not exceeding £40 (now £50); and by the 162nd section the words "party" and "person," whenever used in the Act, are to extend to and include any corporation or public company.

The result of those provisions was that public companies

being within the provisions of the Civil Bill Acts, an ordinary civil bill process could be served on a company by leaving a copy of it at the company's office or place of business with any clerk or servant of the company: *Reynolds* v. *Enfield Cycle Co.* (1). In the Superior Courts of Common Law, service of a writ of summons and plaint might have been effected by delivery of a copy to the secretary of the company, and publication in the "Dublin Gazette" and a local paper of notice of the issuing of the writ: Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), sect. 33; *Moore* v. *Belfast and Ballymena Railway Co.* (2). In 1862 the Companies Act of that year made an alteration in the mode of service of documents on a limited liability company, by providing that they might be served by leaving them at the registered office of the company or by sending them there by post; and it has been decided both in this country and in England that this mode of service must be resorted to in the case of limited liability companies required to be served with any document: *Pearl's Case* (3); *O'Neill* v. *St. Brigid's Well Co.* (4); Gen. Order IX, Rule 9. That section has been replaced by sect. 116 of the Companies Act, 1908. In the present case the mode of service becomes important only because of the contention that *personal* service of process could not be effected on a corporation aggregate having regard to the nature of the body, and consequently that default process against a limited liability company, under the 59th sect. of the Act of 1877, could not have been and was not contemplated, and that public companies were outside the section altogether. That contention depends for its reasoning on the word "personal," for if the provision had been for "service" generally, the mode of service under the Companies Acts would be applicable, and no question would arise.

In considering the effect of the word "personal" in this 59th section, it must be borne in mind that the Act, according to the preamble, is one to extend the jurisdiction of the Civil Bill Courts, and that the ordinary jurisdiction of those Courts was conversant with procedure against companies, and that such

(1) 3 N. Ir. Jur. Reports, 206; judgment of Palles, C.B.

(2) 9 I. C. L. R. 441.

(3) [1902] 1 K. B. 91.

(4) [1895] 2 I. R. 442.

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companies could be made amenable to the jurisdiction by service of process in the manner provided by the Companies Acts, 1862 and 1908. So far as ordinary process is concerned, the Act of 1877 makes no change; but it no doubt gives a new procedure for facilitating the recovery of money demands. In establishing that new procedure, there is no expressed intention to restrict defendants to individuals and to exclude corporations. If the latter be excluded, it must be by inference from the mode of service that is to be employed and nothing else. Down to the direction for service in the section, the latter contemplates an action against either an individual or a corporation; and if the defendants' contention be right, the action lies against the Company, but the summary remedy is barred because the mode of service provided by the same section is inapplicable to a company. I cannot think that the Legislature ever intended such a result, which would be one that would confine the advantages to be derived from it to actions against individuals alone.

But does a direction for "personal" service in the case of a corporation prevent the application of the mode of service prescribed by the Companies Acts? The 62nd sect. of the Companies Act of 1862, and the 116th sect. of the Companies (Consolidation) Act of 1908, are most general in their language. The words of the latter section are—"A document may be served on a company by leaving it at or sending it by post to the registered office of the company." There is no limitation on the class of document or the circumstances under which the document requires service, and if—as I hold it does—it governs the Civil Bill Acts in ordinary cases, I am of opinion that it applies also to cases where a special mode of service had been hitherto provided. The sections of the Companies Acts, in my judgment, mean that whatever enactments as to special modes of service on companies had hitherto existed, they must be subservient to the new rule, which is to be regarded as substitutionary.

Counsel for the plaintiff claimed that *Pearl's Case* (1) was a

(1) [1902] 1 K. B. 91.

conclusive decision on this point. The document in that case was a summons against a company, on the criminal side, under the provisions of the Sale of Food and Drugs Acts, service of which should be effected as provided by section 1 of the English Summary Jurisdiction Act of 1848, namely, by personal service or by serving some one for the defendant at his usual or last known place of abode. The summons was served on the defendant's assistant at his place of business, and the Court held that service bad—not because it did not comply with the provisions of the Summary Jurisdiction Act, which it was argued were inapplicable to a company—but because the proper mode of service was that prescribed by the Companies Act, 1862. I think that decision is very much in point, inasmuch as the method of service under the Companies Act was held to be substituted for the special mode provided by the Summary Jurisdiction Act.

One other argument must be noticed, founded on the English County Courts Act of 1888, the 86th section of which provides for a default procedure somewhat analogous to that provided by the Irish Act of 1877, including personal service of the "summons," which takes the place of the "process" in Ireland. The 86th section is prefaced by the words "subject to any rules or orders under this Act." Rules were made in 1899, but there was no reference to the mode of service on a company of a default summons, save the repetition in Order VII, Rule 29, of the words of the statute as to personal service, and a rule, Order VII, Rule 23, as to service of process generally on a corporation by serving an officer of the corporation in cases where there was no statutory provision regulating same. The 52nd Order also gave a definition of default summons which does not, in my opinion, carry the case much further. But by the County Court Rules of 1895, Order VII, Rule 29*b*, it is specifically directed that a *default* summons issued against a corporation shall be deemed to be sufficiently served if served in accordance with Rule 29, to which I have just referred. It seems to me that these rules leave the interpretation of "personal" or "personally" very much where it would have been without them. Both Act and Rules clearly contemplate default process against a public company, and the additional rule of 1895, Order VII, Rule 29*b*, is merely declaratory of what I would

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regard as the method, in default cases, of service on a company which had been already prescribed by Rule 23. In the view I take I do not see how it could be successfully contended that but for Rule 29*b* default process did not lie against a public company. If the statute excluded companies from default process, the making of a rule providing for service on them might possibly be held to be *ultra vires*. No doubt the Irish County Court Rules of 1890 have no specific provision for service of default process on a company; but that, in my judgment, is no ground for saying that it is an argument for exclusion of companies. The Irish Rules are made pursuant to section 79 of the Act of 1877, and it is not unimportant to note that such rules are to adapt the procedure of the Civil Bill Courts to the constitution, practice, and procedure for the time being of the Superior Courts.

I therefore think we should answer the question put to us in the special case in the negative, and state that, in the opinion of the Court, the practice adopted by the Recorder is not correct in point of law.

MOLONY, J.:—

In this case a default affidavit and process were duly lodged with the Clerk of the Crown and Peace in accordance with the provisions of section 59 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). The process was issued to recover the sum of £14 17*s.* 7*d.* for work and labour done, and materials supplied, by the plaintiffs to the defendants.

The defendants are a limited company, whose registered office is at No. 12 South Anne Street, in the City of Dublin, and the default process, and the notice prescribed by the section, were, on the 8th January, 1913, served by George Morgan, civil bill officer, on Thomas William Stoney, one of the directors of the company, at its registered office. The said default process and notice were also posted in a registered letter addressed to the defendant company at their registered office.

On the default process coming on for hearing before the Right Hon. the Recorder, there was no appearance for the defendant company, and, after hearing counsel for the plaintiffs, the Recorder

struck out the default process, as he was of opinion that the default procedure prescribed by sect. 59 of the County Officers and Courts (Ireland) Act, 1877, was not applicable to a case in which the defendants were a limited company. He held that a limited company could not be "personally served" within the meaning of the section; and the question for our consideration is whether his decision was right in point of law.

Under sect. 65 of the Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), service of any civil bill process on the defendant shall be effected by personal service of the civil bill process, or by leaving a copy thereof at the defendant's house or place of residence, or at his office, warehouse, counting-house, shop, factory, or place of business, with the wife, child, father, mother, brother, sister, or any other relation of the defendant, or his wife, or with any servant or clerk of the defendant, the person with whom such copy shall be left being of the age of sixteen years or upwards. By sect. 69, if any person shall have and occupy any house, warehouse, counting-house, shop, factory or office, for the sale of goods or for carrying on any business in any county, he shall be deemed to have a residence within the county; and by sect. 162 the word "person" shall extend to and include any corporation or public company.

From 1851 corporations and companies were usually served by leaving a copy of the process with a servant or clerk at a shop or place of business within the jurisdiction of the Court: *Reynolds* v. *Enfield Cycle Co.* (1).

Section 59 of the Act of 1877 contains the first statutory provision in Ireland for obtaining decrees by default, and requires that the process, and a notice to the effect set forth in the form in schedule "C" to the Act, "shall be personally served on the defendant fourteen days at the least before the sessions at which the defendant shall be by such process required to appear."

The affidavit to obtain a decree by default prescribed by schedule "B," requires the residence, occupation, and description of the defendant to be inserted. The section is quite general in its terms, and was intended to apply to every defendant who can

(1) 3 New Ir. Jur. Reports, 205.

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be sued for a debt or liquidated demand, and public companies can be so sued in a County Court. The provision in reference to personal service is not applicable to the case of a limited company; but this need not render the section inoperative where the Legislature has provided another mode of service, and made it applicable to all cases where a company can be sued.

Section 116 of the Companies (Consolidation) Act, 1908 (re-enacting sect. 62 of the Companies Act, 1862), provides that a document may be served on a company by leaving it at or sending it by post to the registered office of the company; and by sect. 285 the word "document" includes summons, notice, order, and other legal process. There is nothing to restrict the generality of the provision, and I think this mode of service may be resorted to in cases where a default process is brought under sect. 59. The case of *Pearks, Gunston, and Tee, Limited* v. *Richardson* (1), though not exactly in point, tends to confirm this view.

On the whole case, I am of opinion that a default process brought under sect. 59 of the County Officers and Courts (Ireland) Act, 1877, may be served on a limited company in the manner provided by sect. 116 of the Companies (Consolidation) Act, 1908.

Solicitors for the plaintiffs: *Hamilton & Craig.*
Solicitor for the defendants: *Henry J. S. Fullerton.*

J. G. T.

(1) [1902] 1 K. B. 91.

BUGGY *v.* ASSIGNEES AND PERSONAL REPRESENTATIVES OF WALSH, DECEASED (1).

K. B. Div.
1913.
Nov. 14.

Practice—Landlord and tenant—Ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant—Writ of Summons—Description of defendants—Service by posting.

In an ejectment for non-payment of rent to recover possession of a dwelling-house, which had been demised to E. W. by a lease for a term of which several years were unexpired, it appeared that E. W. was dead; that no person was in possession of the premises; that no representation had been taken out to E. W.; and that a year's rent was due. The writ of summons named as defendants, "The assignees and personal representatives of" E. W., deceased, "and all other persons concerned." It was served by posting a copy on the door of the dwelling-house. An order was made that such service should be deemed good.

M'Cracken v. *Kelly* (5 New Ir. Jur. Rep. 46) followed.

EX PARTE APPLICATION.

The action was brought to recover possession of a house and premises in the city of Waterford, for non-payment of rent. The writ of summons named as defendants "The assignees and personal representatives of Ellie Walsh, deceased, and all other persons concerned." The statement of claim, endorsed on the writ, set out that the premises were held by the defendants from the plaintiffs under a contract of tenancy which was still subsisting, namely, under an indenture of lease, dated the 4th July, 1902, made by the plaintiffs to Ellie Haughton for a term of twenty-five years from the 13th June, 1902, and that all the estate and interest of the said Ellie Haughton afterwards became, and then was, vested in the defendants. The particulars showed that a year's rent was due.

It appeared that in the year 1903, Ellie Haughton, the lessee in the lease, married a man named Michael Walsh, with whom she lived in the demised premises, a licensed publichouse, until

(1) Before KENNY, J.

K. B. Div. 1913.

BUGGY v. REPRESENTATIVES OF WALSH.

her death, which took place on the 16th March, 1913. Michael Walsh died on the 21st June; and since his death the premises had remained vacant and deserted, the furniture, except a few articles of trifling value, having been removed by Michael Walsh before his death. The excise license was not renewed at the annual licensing sessions, and had lapsed.

The writ was issued on the 20th October, 1913, there being then a year's rent due. It was served by posting a copy on the door of the dwelling-house. An affidavit was made by the plaintiffs which, after setting out the above matters, went on to allege:—"We say that the premises were at the date of the service of the writ of summons herein, and are now, vacant and deserted, and there was not then, nor is there now, any person in actual possession, or in receipt of the rents, on whom service other than by posting on the premises might have been effected."

There was a further affidavit from a clerk of the plaintiff's solicitor stating (*inter alia*) that no person whatsoever was in possession or occupation, or in or on said premises, or any part thereof, and that he had posted a true copy of the writ upon the door of the said dwelling-house, being the premises for the recovery of which the action was brought.

It was stated at the Bar that no representation had been taken out to Mrs. Ellie Walsh.

D. J. O'Brien, for the plaintiffs, applied to have service of the writ deemed good. [Kenny, J.: You name no person as defendant.] In a case such as the present it is sufficient to name "The assignees and personal representatives" of the deceased as defendants: *M'Cracken* v. *Kelly* (1); *Harrington* v. *Assignees of Sarah Bytham* (2).

An order was made that the service of the writ already had should be deemed good without further notice.

Solicitor for the plaintiffs: *Patrick R. Buggy.*

A. E. C.

(1) 5 New Ir. Jur. Rep. 46. (2) 2 C. L. R. 1033.

HOLLINGSHEAD AND ANOTHER, APPELLANTS; P. AND H. EGAN, LIMITED, RESPONDENTS.

H. L.
1913.
July 3.

Bankruptcy—Reputed ownership—Bill of Sale—Bankruptcy of grantor before first instalment accrued due—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 313—*Bills of Sale* (*Ireland*) *Act,* 1879, *Amendment Act,* 1883 (46 *Vict. c.* 7), *s.* 7.

APPEAL by the petitioners from the judgment of the Court of Appeal reported [1912] 2 I. R. 170, *sub nom.*, *In re* HARVEY, a bankrupt.

Ronan, K.C., and *Clayton, K.C.* (the latter of the English Bar) (with them, *Robert Doyle, K.C.*, and *F. Denning*), for the appellants.

Cave, K.C. (of the English Bar), and *Blood, K.C.* (with them, *Stephen O'Brien*), for the respondents.

The House of Lords (EARL LOREBURN, LORD ATKINSON, and LORD MERSEY) reversed the judgment of the Court of Appeal with costs (1).

Solicitors for the appellants: *Ellis & Ellis*, for *Hoey & Denning.*
Solicitors for the respondents: *Hamlins, Grammer, & Hamlins*, for *Thomas Conway.*

(1) [1913] A. C. 564.

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BANKRUPTCY—*Arrangement—Acceptance by statutory majority of creditors—Whether "reasonable and proper to be executed under the direction of*

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the Court"—*Bankrupt and Insolvent Act*, 1857, *sect.* 353.] Where the proposal of an arranging debtor is accepted by the statutory majority of his creditors it ought to be acted on by the Court having bankruptcy jurisdiction in the matter, unless there be some specific ground for rejecting it, e.g., that it is unreasonable, inasmuch as the creditors would get a substantially larger sum if the estate were wound up in bankruptcy, or because the debtor has been guilty of some act of commercial dishonesty, such as contracting debts when he knows himself to be insolvent. *In re Pelan* (unreported) stated and followed; *In re O'Neill and Young* (reported *sub nom. In re A and B, arranging debtors*) (46 Ir. L. T. R. 142) distinguished. *In re Fry* - APP. 273

2.——*Reputed ownership—Bill of Sale—Bankruptcy of grantor before first instalment accrued due—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 Vict. c. 60), *s.* 313—*Bills of Sale* (*Ireland*) *Act*, 1879, *Amendment Act*, 1883 (46 *Vict. c.* 7), *s.* 7.] Judgment of the Court of Appeal in *In re Harvey, a Bankrupt*, ([1912] 2 I. R. 170) reversed. *Hollingshead* v. *Egan* - - - H. L. 487

BELFAST LOCAL ACTS—*Civil Bill Appeal*—*Belfast Improvement Act*, 1878 (41 & 42 *Vict. c.* clxxx), *s.* 97—*Belfast Corporation Act*, 1911 (1 & 2 *Geo.* 5, *c.* cxc), *s.* 102—45 & 46 *Vict. c.* 29, *s.* 4.] An appeal does not lie to the Judge of Assize from an order of the Recorder of Belfast, made under sect. 97 of the Belfast Improvement Act, 1887, as amended by sect. 102 of the Belfast Corporation Act, 1911, declaring that an order of the Council of the County Borough of Belfast, requiring an adjoining owner to contribute towards the expense of completing a street, is unjust and unfair. *Davidson* v. *Council of County Borough of Belfast* - - - - - - K. B. 87

2.——*Police rate—General purposes rate—Exemption—Building erected and used for public worship—Belfast Improvement Act*, 1845 (8 & 9 *Vict. c.* cxlii), *sects.* 348, 351—*County Antrim and Belfast Borough Act*, 1865 (28 & 29 *Vict. c.* clxxxiii), *sects.* 51, 53.] In order that property should be exempted from the police rate leviable under the Belfast Improvement Act, 1845, as being a "building erected and used for public worship," it is not necessary that the erection and user should be exclusively for such purpose; it is sufficient that this should be the main and principal purpose. The exemption does not apply to the general purposes rate leviable under the County Antrim and Belfast Borough Act, 1865. By the Belfast Improvement Act, 1845, the Corporation of Belfast are empowered to make a rate, known as the police rate, upon all hereditaments within the limits of the Act; and by the County Antrim and Belfast Borough Act, 1865, they are empowered to make a general purposes rate on the occupiers of all rateable property within the borough. Sect. 351 of the Act of 1845 provides that no person is to be rated in respect of any church, chapel, meeting-house, or other building erected and used for public worship. Sect. 53 of the Act of 1865 enacts that the provisions of the Act of 1845, relating to the making, collecting, or recovering of rates, and to appeal against the same, shall extend to the general purposes rate. The Corporation having assessed the police rate and general purposes rate upon premises in the city of Belfast known as the Grosvenor Hall, the owners and occupiers of the Hall appealed to the Recorder of Belfast. It appeared that the Hall was built with the primary object of providing a large audience-chamber for religious services, and that such services continued the main object; and the Recorder found that the premises constituted in all essential respects a Methodist Church, unless some of the facts hereafter mentioned deprived them of that character. They were licensed for the celebration of marriages; and marriages were celebrated therein, and Baptism and Communion administered. There was a regular Church membership of 700 to 800 persons, and two stated clergymen. Public religious services were held twice or three times every Sunday. In addition to religious services, concerts and cinematograph exhibitions were held on the premises about twenty-five nights in each year, and literary and scientific lectures about thirty nights, a small charge for admission being made to defray expenses. The premises were licensed under sect. 51 of the Public Health Amendment Act, 1890. The Recorder held that the premises were exempt from both police rate and general purposes rate. *Held*, that there was evidence on which the Recorder could find, and that he rightly found, that the premises were erected and used for public worship, and were therefore exempt from the police rate. But *held*, following and applying *Cunningham* v. *Belfast Corporation* and *M'Causland* v. *Belfast Corporation* ([1913] 2 I.R. 450, note), that the exemption in sect. 351 of the Act of 1845 did not apply to the general purposes rate imposed by the Act of 1865, and that the premises were liable to this rate. *The King* (*Belfast Corporation*) v. *The Recorder of Belfast*. [K. B. 439

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the validity of the recovery, and that, in the absence of proof of disseisin of *D.* and her children, the plaintiffs were not entitled to recover rent. *Witham* v. *Notley*; *Same* v. *Sloane* [K.B., 281; App., 290

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old metals.] Where a person, not being himself a licensed general dealer under the General Dealers (Ireland) Act, 1903 (3 Edw. 7, c. 44), purchases from an individual a quantity of lead less than 112lb., such purchase, if made by the purchaser as agent of a licensed general dealer, is not a contravention of the General Dealers (Ireland) Act, 1903. A licensed general dealer under that statute can deal by an agent or servant not only upon his licensed premises but also outside those premises, the dealer being responsible for the recording and accuracy of the entries required by the statute in respect of purchases so made by his agent or servant. *Dunne, Appellant*; *Lee, Respondent* - - - - - - K.B. 205

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INDICTABLE OFFENCE—Returning for trial —Judicial act—Prohibition - 342, 377
See JUSTICES. 2, 3.

INFANT—Entry on lands of—Bailiff 281, 290
See ESTATE TAIL.

INFERENCES OF FACT—Power of Court to draw - - - - - - 64, 81
See WARRANTY.

INSURANCE — *Live-stock policy — Proposal basis of contract—Non-disclosure in proposal of facts known to proposer and material to the risk—Knowledge of material facts, not disclosed, acquired by agent of insuring company prior to the existence of his agency with the company—Principal and agent—Liability of principal in respect of antecedently acquired knowledge of agent—Condition in proposal that insured had not "withheld important information"—Interpretation of contract—Immaterial finding of jury.*] Every act of an agent within the scope of his employment is the act of his principal; and, consequently, all knowledge acquired by the agent, when acting within the scope of his authority, is the knowledge of his principal; but knowledge acquired by the agent antecedently to his becoming agent to the principal ought not to be imputed to the latter, and the recollection or forgetfulness of the agent of matters known to him previous to that relation ought not to affect the liability of the principal, except in cases where the principal purchases the previously obtained knowledge of the agent in relation to a particular subject-matter; or where, from his position and relationship to the principal, the agent is the agent of his principal "to know or to inquire." *Dresser* v. *Norwood*, 17 C.B. (N. S.), 466, distinguished. *S.*, a station-master at a provincial town, acted as local agent for several Insurance Companies. In 1907 the plaintiff insured with one of these companies, the *A.* and *N.*, through *S.* as that company's agent, a stallion

INSURANCE—*continued.*

horse, valuable for stud-purposes, but suffering from an incurable malformation of the forelegs. In February, 1908, the *A.* and *N.* Company refused to re-insure the stallion, and that refusal was communicated to the plaintiff and to *S.*, who at that time had not become agent for the defendant company. In 1909, *S.* having become agent of the defendant company, the plaintiff agreed to insure the stallion with that company through *S.*, and a proposal for that insurance was signed by the plaintiff in October, 1909. The proposal contained several questions to be answered by the proposer, and at the foot a declaration by the proposer that he warranted the truth of the statements therein, and declared that he had not "withheld any important information," and agreed that the declaration and proposal should be the basis of his contract with the company. The answers in the proposal form were filled in by *S.*, acting, to that extent, as agent for the plaintiff; and to portion of one of the questions, *i.e.* "Have you had a proposal for live stock insurance declined?" no answer was given. The policy was issued by the defendants; and, on the death of the stallion, the plaintiff sued the defendants for the sum for which the stallion had been insured. The defence relied on was breach of condition in the contract of insurance by reason of (*inter alia*) the non-disclosure of a refusal for live-stock insurance, and, in reply, the plaintiff pleaded knowledge of the refusal by the defendants at the time the policy was effected, and waiver of the breach. At the trial the jury found that the physical condition of the stallion and also the previous refusal for his insurance were "important," but disagreed on the question whether important information had been "withheld." The learned Judge, treating the disagreement as immaterial, entered a verdict for the defendants. Upon a motion for a new trial:—*Held*, that the knowledge of the refusal to re-insure the stallion having been acquired by *S.* previous to becoming the agent of the defendants could not be imputed to them, and that, the jury having found that the refusal was "important," the learned judge rightly treated the disagreement as to the withholding of important information as immaterial, that being a question of interpretation of the contract between the parties, and that the verdict entered should stand. *Taylor* v. *Yorkshire Insurance Co.*
[K. B. 1

—— National - - - - - - 455
See NATIONAL INSURANCE ACT, 1911.

INSPECTION — Of documents — Action of slander - - - - - 313
See PRACTICE. 2.

INTEREST—Grossly in excess of risk—Loan by money-lender—Re-opening transaction
See MONEY-LENDER. [416

JOINT OWNERS—Summons for ejectment of small tenement brought by one of two joint owners - - - - 381
See LANDLORD AND TENANT. 1.

JUDGE OF ASSIZE—Appeal to - 87
See BELFAST LOCAL ACTS. 1.

JUDICIAL ACT—Justices returning for trial—Prohibition - - 342, 377
See JUSTICES. 2, 3.

—— Order of County Court under sect. 6, sub-s. 4 (*c*) of Labourers (Ireland) Act, 1906 [241, 249
See LABOURERS (IRELAND) ACTS. 1.

JURISDICTION—Of Justices of the Peace.
See under JUSTICES.

JURY—Disagreement—Question of law—Interpretation of contract - - - 1
See INSURANCE.

JUSTICES—*Disqualification—Bias—Conduct of interested justice calculated to lead public to think he was taking part in the adjudication.*] *U.* was prosecuted before the justices at Petty Sessions for having on his premises purloined yarns. The prosecution was brought by the direction of a linen trade association, and on the complaint of their inspector. When the case came on, *U.*'s solicitor objected to any magistrate taking part in the proceedings who was a member of the association. *M.*, who was one of the justices, and was presiding as chairman, stated that he was a member of the association, but that he had no personal interest and would adjudicate. At the close of the statement of the complainant's case, and before any evidence was given, *M.* left the chair, and took his seat on the bench, some distance from the other magistrates. After a short time, he left the bench and went into the magistrates' room, and was there when the other magistrates came in to consider their decision, but at once retired. He took no part in the adjudication. *U.* was convicted of the offence charged. *Held*, that the conviction must be quashed with costs to be paid by *M.* *The King* (*Uprichard*) v. *Justices of County of Armagh* [K. B., 410

2.—*Disqualification — Bias — Indictable offence — Prohibition—Right to give costs against Crown.*] *C.* was arrested on a warrant charged with an indictable offence, and brought before *E.*, a justice of the peace for the county of the city of Belfast, who had been asked by the Crown Solicitor to take the depositions. *E.* sat in a room in the police-station, and on the request of the Crown Solicitor

made an order excluding all persons except representatives of the accused. Several other justices for the county of the city of Belfast endeavoured to enter the room, but were refused admission. *C.*'s solicitor applied to *E.* to admit the other magistrates, but *E.* refused to do so, giving as a reason that he was guided by the Crown, and directed by the Crown not to allow the other magistrates to be present. *C.* having applied for a writ of prohibition to prohibit *E.* from proceeding further in the matter, on the ground of bias:—*Held*, while entirely acquitting *E.* of any moral blame, that a reasonable public might think that the expression used by *E.* implied that in making his order he was acting by the direction of the Crown and not exercising his own discretion, and that the writ of prohibition should be granted. The case had been taken up by the Crown on behalf of *E. Held.* that there was no power to give costs against the Crown. *The King* (*Courtney*) v. *Emerson* - - - - - K.B., 377

3.—*Disqualification — Bias — Jurisdiction — Indictable offence—Judicial Act—Prohibition—Warrant to arrest—Right of district inspector to whom warrant addressed to select justice to hear complaint —Prisoner produced at Petty Sessions—Justice who issued warrant refusing to act alone—Right of district inspector to select another justice — Order of discharge — Application of Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *to cases of surety for the peace.*] *R.* and *S.* were arrested on a charge of an indictable offence on warrants issued by *N.*, a resident magistrate. The warrants were in the form given in the schedule to the Petty Sessions (Ireland) Act, 1851, and commanded *M.*, the District Inspector of the Royal Irish Constabulary, to whom they were addressed, to bring the prisoners before *N.* or some other justice. The prisoners when arrested were lodged in the police cells, and brought next morning into the dock of the Petty Seesions Court, *N.* being on the bench together with *D.* and seven other magistrates. The names of the prisoners and the offences with which they were charged had been entered in the Petty Sessions order-book, but without the authority of *M.* or the Crown Solicitor, and when produced in the dock their names were called from this book by the Clerk of the Court. Counsel for the Crown stated that he proposed to bring the prisoners before *N.* alone. *N.* ruled that the other justices sitting with him were also seised of the cases. Crown counsel then directed the prisoners to be removed by the police, and this was done. The magistrates present, with the exception of *N.* and *D.*, were of opinion that the prisoners should be discharged, but no formal poll was taken, and by the direction of *N.* an order was entered in the order-book: "No appearance for the complainant." During the course of the proceedings *D.* referred to the Bench being packed. He said to the prisoners' counsel "There are seven on your side." "You have seven magistrates to do as you like." The prisoners were subseqnently brought by *M.* before *D.* alone, no formal notice of this being given to their solicitors. *D.* took the deposition of the constable who had arrested the prisoners, and then remanded them on bail. Neither their counsel nor solicitors were present. They applied for a writ of prohibition, prohibiting *D.* from further proceeding in the taking of depositions on the ground of bias and want of jurisdiction. *Held*, that the function of magistrates in returning for trial is judicial, and prohibition will lie if bias or want of jurisdiction is established. *Held*, by Palles, C.B., and Gibson, J., Boyd, J., dissenting, that there had been no valid order of discharge, and that *D.* had jurisdiction. *Held*, by Gibson and Boyd, JJ., Palles, C.B., dissenting, that *R.* and *S.* were properly before the Court of Petty Sessions, and were illegally removed, and that that Court would have had jurisdiction to make an order. *Held*, by Palles, C.B., and Gibson, J., Boyd, J., dissenting, that bias on the part of *D.* was not established. *Quære*, is an application for sureties of the peace within the Petty Sessions Act? *The King* (*Bransfield*) v. *Justices of Cork* ([1912] 2 I. R. 151) considered. *The King* (*Rea*) v. *Davison* - - K.B. 342

4.——*Jurisdiction—Claim of right—Obstruction to highway— Goods exposed for sale on street during fair—Evidence—Public market*—Bona fide *claim of right—Ouster of jurisdiction.*] On a prosecution by the *M.* District Council for obstruction to the public street of the town of *M.*, there was evidence that the act complained of as an obstruction was the exposing for sale, during a public fair held in the streets of the town of *M.*, of goods on the pavement; that the same class of goods had been sold at such fairs in the public street twenty years before; and that public fairs had been held in the streets of the town for twenty years and upwards. The prosecutrix, the defendant in the prosecution, claimed before the justices the right so to expose her goods, but was convicted and fined. Upon motion to make absolute a writ of *certiorari* to bring up and quash the conviction:—*Held*, that on the evidence it might be inferred that the dedication of the street was subject to the right to hold thereon public fairs at stated intervals, that there was evidence that the prosecutrix had the right to sell her goods as a member of the public at such public fair, and that there was, consequently, a *bona fide* claim of right on her part to do the acts com-

JUSTICES—*continued.*

plained of as an obstruction, which claim being material to their decision ousted the jurisdiction of the justices. When there is a *bona fide* claim of right material to the decision, as the justices have no jurisdiction to determine the existence of the right, they have no jurisdiction to determine whether, in the case before them, there has been an excessive user of the alleged right. *The King* (*Kennedy*) v. *Justices of County Cork* K. B. 391

5.——*Right of appeal to Quarter Sessions—Dangerous wall—Order to take down or repair—Effect of decision of justices as to ownership of wall—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 75—*Towns Improvement* (*Ireland*) *Act*, 1854 (17 & 18 *Vict. c.* 103), *ss.* 39, 93—*Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 24.] An appeal to Quarter Sessions does not lie under section 24 of the Petty Sessions (Ireland) Act, 1851, from an order of justices made under section 75 of the Towns Improvement Clauses Act, 1847 (incorporated in the Towns Improvement (Ireland) Act, 1854), ordering the owner of a dangerous wall to take it down, rebuild, or repair it, even though the expense involved in doing the work may exceed forty shillings. *Semble*, although the justices in making such order have jurisdiction to inquire who is the owner of the wall, in order to ascertain whether the proper notices have been given, that inquiry is one preliminary to the exercise of their jurisdiction, and their decision as to ownership is not conclusive in a subsequent proceeding to recover the expenses. *The King* (*Ahern*) v. *The Recorder of Cork* - K. B. 35

—— Caretaker—Put into possession by agent—Summons for possession by agent 113, [117

See CARETAKER.

—— Ejectment of small tenement—Summons by one joint owner - - - 381

See LANDLORD AND TENANT. 1.

—— Jurisdiction — Summary Conviction — National Insurance Act, 1911 - 453

See NATIONAL INSURANCE ACT, 1911.

—— Licensing Acts—New License—Certificate—Provisional Valuation - - 332

See LICENSING ACTS.

LABOURERS (IRELAND) ACTS—*Improvement scheme—Cottage—Order of County Court—Judicial act—Undertaking not to let cottage to objectionable tenant — Illegality — Prohibition — Labourers* (*Ireland*) *Act*, 1906 (6 *Edw.* 7, *c.* 37), *section* 6, *sub-s.* 4 (*c*).] An order of the County Court under section 6, sub-sect. 4 (*c*), of the Labourers (Ireland) Act, 1906, confirming, amending, or disallowing an order of a Local

LABOURERS (IRELAND) ACTS—*continued.*

Government Board Inspector confirming an improvement scheme, is a judicial act, and is the subject of prohibition. *R.* (*Eustace*) v. *Local Government Board* (44 I. L. T. R. 176) distinguished. An order of a Local Government Board Inspector, confirming an improvement scheme under the Labourers (Ireland) Acts, provided for the taking of a site on lands in the occupation of *M.* for a cottage to be built for *R.*, on whose behalf a representation under the Acts had been made. *M.* presented a petition to the County Court against this provision, on which an order was made confirming the order of the Inspector, and proceeding:—"The respondents" (the Rural District Council) "undertaking not to put into occupation of the cottage any labourer reasonably objectionable to the petitioner, and to consult the petitioner as to the selection of the tenant." The site was then acquired by the Rural District Council, and a cottage built upon it which was let to a tenant, not *R.* On an application by *R* for a writ of prohibition to prohibit proceeding on the undertaking in the order of the County Court:—*Held*, that the undertaking was illegal, but that inasmuch as it did not order anything to be done, and also on the ground of lapse of time, a writ of prohibition ought not to be granted. *The King* (*Ryan*) v. *The Recorder of Cork* - - - - K. B. 241; APP. 249

2. —— *Maintenance of fences on lands compulsorily acquired — Liability of District Council therefor—Incorporation of section* 15 *of Railways* (*Ireland*) *Act*, 1864 (27 & 28 *Vict. c.* 71), *in Labourers Acts.*] A Rural District Council who take a plot of land under the provisions of the Labourers (Ireland) Acts, for the purpose of building thereon a labourer's cottage, and who erect thereon a properly constructed fence between the land so taken and the adjoining land of the owner from whom the plot was taken, are under no liability to the owner of such adjoining land to maintain such fence in an efficient state. Section 15 of the Railways (Ireland) Act, 1864, which is incorporated in the Labourers (Ireland) Acts by section 16 of the Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60), is applicable to railway companies taking land for the purposes of a railway, and does not apply to a District Council taking land for the erection of labourers' cottages. *Elliott* v. *Strabane Rural District Council* (*No.* 2), K. B. 193

LAND PURCHASE (IRELAND) ACTS—*Superior interest—Fee-farm rent—Redemption—Purchase-money insufficient to provide for full redemption-price—Right of owner of rent to sue on covenant for payment—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 16, *sub-s.* 1—*Land Law* (*Ireland*) *Act*, 1896 (59 & 60 *Vict. c.* 47), *section*

LAND PURCHASE (IRELAND) ACTS—*continued.*

31, *sub-s.* 1.] Where before the making of a vesting order under section 16 of the Irish Land Act, 1903, the lands thereby vested in the Land Commission are held under a fee-farm grant reserving a rent, which grant contains a covenant for its payment and constitutes a "superior interest," such rent, until redeemed by full payment of the redemption-price fixed, is, as regards all persons other than the Land Commission and those claiming through it, to be deemed to continue as a rent, and the covenant continues to subsist as if the rent had not ceased against the land. *So held*, by Palles, C.B., and Boyd, J., Gibson, J., *diss.* A fee-farm grant made in the year 1866, granting certain lands to the grantee and his heirs at the yearly rent of £150, contained a covenant by the grantee for himself, his heirs, executors, administrators, and assigns, that the grantee, his heirs or assigns, would at all times during the estate thereby granted pay the said rent to the grantor, his heirs or assigns, by half-yearly payments. The lands comprised in the grant subsequently became vested in *B*, and formed part of his demesne. An agreement was entered into between *B* and the Irish Land Commission, under the provisions of sect. 3 of the Irish Land Act, 1903, by which the Land Commission agreed to purchase the demesne from *B* and re-sell it to him. An order of the Land Commission was made vesting the lands in the Land Commission, and on the same day a further order was made vesting them in *B* in fee-simple. By an order of the Estates Commissioners the sum of £2300 was fixed as the selling value of the part of the demesne consisting of the lands comprised in the fee-farm grant. By a subsequent order of the Land Commission it was ordered that the rent of £150 reserved by the grant, together with the value of the covenants therein, should be redeemed at the price of £3000, and by a further order of the Land Commission the sum of £2300 was placed to the separate credit of the redemption-price. The plaintiff, who was the devisee of the grantor in the fee-farm grant, refused to accept this sum, and brought the present action against the personal representatives of the grantee, claiming as due under the covenant in the grant a half year's rent which had accrued due subsequently to the date of the vesting order. The action was tried by Dodd, J., without a jury, and he gave judgment for the defendants. On a motion by the plaintiff to have this judgment set aside, and judgment entered for him:—*Held*, by Palles, C.B., and Boyd, J., Gibson, J., *diss.*, that the plaintiff was entitled to judgment for the amount claimed. *Colles* v. *Hornsby* - - - - - - K. B. 210

—— Negotiation fee paid to agent—Income Tax
See REVENUE. 1. [462

LANDLORD AND TENANT—*Ejectment of small tenements—Summary jurisdiction—Summons by one joint owner—Summary Jurisdiction Act*, 1851 (14 & 15 *Vict. c.* 92), *section* 15.] Where a small tenement, which is within the terms of section 15 of the Summary Jurisdiction Act, 1851, is owned by joint owners, a summons under the above-named section against the tenant to recover possession of the premises cannot be sustained if it is in the name of one joint owner merely who sues as owner. *Quaere*, Must a plaintiff in proceeding under the section prove a demand and refusal of possession? *Mills, Appellant*; *Hoey, Respondent* [K. B. 381

2.——*Ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant—Writ of Summons—Description of defendants—Service by posting.*] In an ejectment for non-payment of rent to recover possession of a dwelling-house, which had been demised to *E. W.* by a lease for a term of which several years were unexpired, it appeared that *E. W.* was dead; that no person was in possession of the premises; that no representation had been taken out to *E. W.*; and that a year's rent was due. The writ of summons named as defendants "The assignees and personal representatives of" *E. W.*, deceased, "and all other persons concerned." It was served by posting a copy on the door of the dwelling-house. An order was made that such service should be deemed good. *M'Cracken* v. *Kelly* (5 New Ir. Jur. Rep. 46) followed. *Buggy* v. *Assignees and Personal Representatives of Walsh, deceased* [K. B. 485

—— Caretaker put into possession by agent—Summons by agent for possession—Owner by estoppel—Known agent 113, 117
See CARETAKER.
See also LAND PURCHASE (IRELAND) ACTS.

LEAD—Purchase of, by agent of general dealer
See GENERAL DEALER. [205

LICENSING ACTS—*New licence—Justices—Certificate—3 & 4 Wm. 4, c. 68, s. 5—2 Edw. 7, c. 18, ss. 3, 5—Valuation.*] To satisfy sect. 5 of the Licensing (Ireland) Act, 1902, on applications for new licences, a complete and effective valuation of the premises proposed to be licensed, and one which could be made the basis of rating, must be produced to the Licensing Sessions, and a valuation, though issued from the office of the Commissioner of Valuation, which purports on its face to be provisional only, is not sufficient. *The King (Harrington)* v. *Justices of Roscommon* [APP. 332

LIEN — *Vendor's lien—Covenant to maintain vendor.*] *A* assigned by deed to her son a dwelling-house and farm in consideration of natural

LIEN—*continued.*
love and affection, and of the covenants on the part of the son thereinafter contained. The deed contained a covenant by the son, that he, his executors, administrators, or assigns, would maintain *A* and her daughter during their lives, and permit them to occupy the dwelling-house. *Held*, that there was a lien on the lands for such maintenance which was binding as against a subsequent purchaser for value with notice. *Richardson* v. *M'Causland* (Beatty 457) applied and followed. *Kelaghan* v. *Daly* - - - - - BOYD 328

LOAN—Interest grossly in excess of risk—Re-opening transaction - - 416
See MONEY-LENDER.

LOCAL GOVERNMENT — *Public Health—"Single private drain or sewer"—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 2; *Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.] A pipe connected with the drains of several dwelling-houses, owned by different owners, and constructed by the owners of those dwelling-houses on private ground, as, and used as, a common conduit to receive and carry away the sewage from those houses brought down by the connecting drains, is not a "sewer" vested in the sanitary authority under sect. 2 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), but is a "single private drain" under sect. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59). *Holywood Urban District Council, Appellants*; *Grainger, Respondent* - - - - - - K.B. 126

2.—— *Rating—Land used as a railway—Valuation list—Rate based on valuation—Finality of rate—Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *ss.* 60, 62—*Valuation Act*, 1852 (15 & 16 *Vict. c.* 63), *ss.* 12, 27.] An urban council pursuant to sect. 60 of the Towns Improvement (Ir.) Act, 1854, struck a rate on hereditaments and premises the property of a railway company, based upon the final valuation list delivered by the Commissioner of Valuation. Certain premises, alleged by the railway company to be "used as a railway," and as such liable to be assessed in the proportion of one-fourth part only of their net annual value under sect. 62 of the Act of 1854, were included in the said valuation list under the heading "buildings" and not under the heading "railways, fisheries," &c., and were accordingly assessed by the urban council at their full value. No objection was made by the railway company to the valuation list prior to the striking of the rate, and no appeal was taken by them either against the valuation or the rate. The urban council having sued the railway company for the disputed rate:—*Held*, by the King's Bench Division (Palles, C.B., and Kenny, J.; Wright, J., diss.) and by the Court of Appeal, that the plaintiff was entitled to recover the full rate. *Held*, by Palles, C.B., and the Court of Appeal, that the description in the final list delivered by the Commissioner of Valuation was conclusive that the hereditaments were not a "railway" or "lands used as a railway," and that the urban council were bound accordingly to rate them at their full value. *Per* Kenny, J.: A mistake in the description of the hereditaments could only have been corrected (1) by an objection lodged with the Commissioner of Valuation; (2) by an appeal from the Commissioner; or (3) by an appeal from the rate. *Whaley* v. *The Great Northern Railway Company* [K.B. 142; APP. 171

3. —— *Road materials taken by county surveyor—Right of owner to sue for value—Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162—*Local Government (Adaptation of Irish Enactments) Order*, 1899, *Sch.*] The owner of lands cannot maintain an action to recover the value of stones or other materials taken out of the lands by a county surveyor or contractor for the repair of roads, &c., under the provisions of sect. 162 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899. *Britton* v. *Tipperary County Council* - - - - - - K. B. 468

4.—— *Urban District Council—Appointment of Town Clerk—Right to prescribe qualifying examination—Commissioners Clauses Act*, 1847 (10 & 11 *Vict. c.* 16), *s.* 65—*Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *s.* 30.] A resolution passed by an Urban District Council that a candidate to be elected by the Council at a forthcoming election to fill the office, then vacant, of Town Clerk, must have passed a qualifying examination, is valid. But a resolution the effect of which is to interfere with the discretion of the Council at future elections in making future appointments is *ultra vires*. *The King (Casey)* v. *Tralee Urban District Council* - K. B. 59

—— Fences—Rural district council—Land taken for labourer's cottage—Liability to repair fence, - - - - 193
See LABOURERS (IRELAND) ACTS, 2.

—— Highway—Excessive user—Action by County Council for extraordinary expenses of repair—Service out of jurisdiction—Public Roads (Ireland) Act, 1911 - - - - - - 89, 96
See PRACTICE. 4.

—— Highway—Injury to, by traction-engine—Nuisance—Special damage—Right of County Council or Rural District Council to sue - - - 250
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LOCAL GOVERNMENT—*continued.*

—— Improvement Scheme—Order of County Court confirming—Judicial Act 241, 249
See LABOURERS (IRELAND) ACTS. 1.

—— Income Tax—Waterworks—Water supplied by Rural District Council—Profit made
See REVENUE. 2. [44

—— Old Age Pension Committee — Invalid election — *Quo Warranto* — Power of County Council to remove member of Committee - - - - - 55
See OLD AGE PENSION ACT, 1908.

LOCOMOTIVE—Excessive weight—Injury to highway—Right of County Council or District Council to sue - - 250
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—— Injury to highway—Action by County Council for extraordinary expenses of repair—Service out of jurisdiction—Public Roads (Ireland) Act, 1911 89, 96
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LOST GRANT—Presumption of—Right of way—Holdings under common landlord 322
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MAINTENANCE—Covenant for—lien 328
See LIEN.

MARKET—Dedication of street subject to right of public fair—Goods exposed for sale—Obstruction of highway—*Bona fide* claim of right—Ouster of jurisdiction of justices
See JUSTICES. 4. [391

MASTER AND SERVANT.
See under WORKMEN'S COMPENSATION ACT, 1906.

MISTAKE—As to time for appealing—Enlargement of time - - - - - 250
See PRACTICE. 1.

—— In description of hereditaments in valuation list - - - - - - 142, 171
See LOCAL GOVERNMENT. 2.

MONEY-LENDER—*Interest grossly in excess of risk—Transaction re-opened as harsh and unconscionable—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.] Where on a loan by a money-lender the rate of interest charged is grossly excessive as compared with the risk, having regard to the facts as to the financial position of the borrower known to the lender, or which would have been known to him if he had made proper inquiries, the Court may re-open the transaction as being "harsh and unconscionable" within the meaning of section 1 of the Money-lenders Act, 1900, although the borrower is competent, and there is no element of fraud or other unfairness in the transaction. Interest charged at the rate of 80 per cent. per annum where the Court was of opinion that the reasonable rate, having regard to the risk and all the circumstances, should not have exceeded 25 per cent., held sufficient of itself to entitle the borrower to have the transaction re-opened. *Thomas* v. *Ashbrook* - K. B. 416

NATIONAL INSURANCE ACT, 1911—*Justices — Jurisdiction — Summary Conviction — Offence under National Insurance Act*, 1911 — *Application of Petty Sessions (Ireland) Act*, 1851 —*Statute—Construction — Incorporation, rejecting inconsistent provision — National Insurance Act*, 1911—(1 & 2 *Geo.* 5, *c.* 55), *s.* 69, *sub-s.* 2—*Fines Act (Ireland)*, 1851, *Amendment Act*, 1874 (37 & 38 *Vict. c.* 72), *s.* 5 — *Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 42.] Justices at petty sessions have jurisdiction to hear a complaint for an offence under sect. 69, sub-sect. 2, of the National Insurance Act, 1911, and the procedure prescribed by the Petty Sessions (Ireland) Act, 1851, applies to such offence. The sub-section above referred to enacts that an employer who has failed to pay a contribution which he is liable to pay under the Act shall be liable "on summary conviction" to a fine as therein mentioned. Sect. 5 of the Fines Act (Ireland), 1851, Amendment Act, 1874, provides that where by an Act then in force or thereafter to be passed it is enacted that offences may be prosecuted in a summary manner, they may be prosecuted with respect to parts of Ireland other than the police district of Dublin Metropolis, before a justice or justices of the peace at petty sessions, subject and according to the provisions of the Petty Sessions (Ireland) Act, 1851. Section 42 of the last-mentioned Act declares that its provisions shall not be applicable to complaints under any of the Acts relating to Her Majesty's revenue of excise or customs, stamps, taxes, &c. *Held* that, even assuming the National Insurance Act of 1911 to be within the description of the Acts referred to in sect. 42 of the Petty Sessions Act, the effect of sect. 69 of the Act of 1911, taken in conjunction with sect. 5 of the Act of 1874, was to incorporate with the Act of 1911 all the provisions of the Petty Sessions Act, except the 42nd section, in the same way as if there had been a provision that, notwithstanding the 42nd sect. of the Petty Sessions Act, the procedure prescribed by that Act should apply to offences in Ireland within sect. 69, sub-sect. 2, of the National Insurance Act, 1911. *Quaere*, Is the National Insurance Act, 1911, within the class of Acts referred to in sect. 42 of the Petty Sessions Act? *Irish Insurance Commissioners, Appellants*; *Hamilton, Respondent* - - - - - K. B. 453

NEW TRIAL—Breach of warranty—Questions left to jury—Power of Court to draw inferences of fact - - - 64, 81
See WARRANTY.

—— Misdirection—Verdict and judgment against both principal and agent - - 265
See PRINCIPAL AND AGENT.

NEWSPAPERS—Carriage by passenger train—Inequality of charges—Railways Clauses Act, 1845, sect. 90 - - - - 255
See RAILWAY COMPANY.

NOTICE—Facts known to agent prior to existence of agency—Notice to principal 1
See INSURANCE.

NUISANCE—Locomotive on highway—Excessive weight - - - - - 250
See HIGHWAY.

OLD AGE PENSION ACT, 1908—*Old Age Pensions Committee—County Council—Committee not validly elected*—Quo warranto—*Regulation enabling appointing Council to remove member of committee—Validity of—Old Age Pension Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 8 (1); *s.* 10 (1) (*c*)—*Old Age Pension Regulations*, 1908, *Reg.* 21 (3) (*d*)—*Schedule to Local Government (Application of Enactments) Order*, 1898, *Art.* 36 (10), vi. viii.] The term of office of a local pension committee appointed under the Old Age Pensions Act, 1908, having expired, a resolution was passed at a meeting of the County Council purporting to appoint a new committee which included *M.* as one of the members. The summons convening the meeting of the County Council had not, as required by Art. 36 (10) vi of the Schedule to the Local Government (Application of Enactments) Order, 1898, specified the appointment of such committee as business to be transacted at the meeting. An application having been made for an information in the nature of a *quo warranto* against *M.*:—*Held*, that the committee not having been validly appointed, there was no existing office, and therefore *quo warranto* did not lie. *Quaere*, Is Regulation 21 (3) (*d*) of the Old Age Pensions Regulations, 1908, enabling the appointing council at any time to remove any member of the committee, *ultra vires*? *The King (FitzGerald)* v. *McDonald* [K. B. 55

OLD METALS—Purchase of, by agent of general dealer - - - - - 205
See GENERAL DEALER.

ORDER AND DEPOSITION—Bill of Sale—Bankruptcy of grantor - - 487
See BANKRUPTCY. 2.

ORDERS, GENERAL.
See RULES AND ORDERS.

OWNER BY ESTOPPEL—Caretaker put into possession by secretary of club 113, 117
See CARETAKER.

PARENT—Unfitness of — Right of poor-law guardians to assume parental control [337
See POOR LAW.

PARTIES—Co-defendants — Action of tort—Principal and agent—Service out of jurisdiction - - - - - 402
See PRACTICE. 3.

—— Ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant — Description of defendants in writ of summons - 485
See LANDLORD AND TENANT. 2.

PAUPER CHILDREN—Power of poor law guardians to assume parental control [337
See POOR LAW.

PETTY SESSIONS (IRELAND) ACT, 1851—Procedure under, applicable to offences under National Insurance Act, 1911 453
See NATIONAL INSURANCE ACT, 1911.

—— Procedure under, whether applicable to cases of surety of the peace - - 342
See JUSTICES. 3.

PLURAL—Words in singular not read as including plural - - - - - 397
See SHOPS ACT, 1912.

POLICE RATE—Building used for public worship—Exemption - - - 439
See BELFAST LOCAL ACTS. 2.

POLICY.
See INSURANCE.

POOR LAW — *Guardians' power to assume parental control—Condition precedent—Unfitness of parent*—Habeas corpus—*Poor Law (Ireland) Act*, 1899 (62 & 63 *Vict. c.* 37), *section* 1; *Poor Law (Ireland) Act*, 1892 (55 *Vict. c.* 5), *sect.* 2. Where a Board of Guardians desire to exercise the powers of parental control over pauper children given to them by the Poor Law (Ireland) Act, 1899, section 1 (ii), a resolution to the effect that they are of opinion the parent of the child is unfit, by reason of the existence of some one or more of the conditions set out in sub-sect. (1) (ii) of that section, is a condition precedent to the exercise of such power; and accordingly where the guardians assumed parental control of children, purporting to act under such section, without having passed such resolution, the Court, upon the application of the parent, granted a writ of *habeas corpus* directed against the guardians to release such children. A resolution, regular in form under the Poor Law (Ireland) Act, 1892, sect. 2, ceases to be operative

POOR LAW—*continued.*

if and when the parents or parent cease to be in receipt of indoor relief. *In re McGlynn* [K. B. 337

PRACTICE — *Appeal— Orders* (1905) *LVIII, R.* 15; *LXIV, R.* 7—*Enlarging time—Mistake*—Bona fide *intention to appeal.*] Where the unsuccessful party in a case stated under 27 & 28 Vict. c. 99, *bona fide* intended to appeal to the knowledge of the opposite party, but fell into the mistake, shared by the opposite party, that the order was one from which an appeal could be taken within a year, and the position of the parties was unchanged, the Court of Appeal extended the time for appealing, under Order LXIV, Rule 7. *County Council of Cavan and Bailieborough Rural District Council* v. *Kane Brothers* - - - - App. 250

2.—— *Discovery — Slander — Justification of matters of fact—Plea of fair comment as to expressions of opinion — Trading company — Imputations of insolvency and mismanagement—Production of documents—Balance sheets—Books of accounts and ledgers—Bank-books—Relevancy—Practice — Order XXXI, Rules* 13–15.] In an action of slander brought by a limited company trading on the co-operative system and registered as a friendly society, the defendants pleaded, *inter alia*, the truth in their ordinary sense of the words spoken so far as they were allegations of fact and fair comment as regards expressions of opinion. The defamatory matter was contained in a speech delivered by the defendant, and the only allegations of fact in it were statements of the assets and liabilities of the Society on the expiration of three several years. Under an order for discovery the Society's secretary and manager made an affidavit, the schedule to which disclosed the balance-sheets for these years, and also the Society's ledgers, books of account, and bank books, claiming no privilege. In accordance with notice by the defendant the Society produced the balance-sheets for his inspection, but declined to produce the remaining scheduled documents. The balance-sheets agreed with the figures quoted by the defendant in his speech. On the Society admitting on the order the truth of the figures quoted by the defendant and of the balance-sheets, the Court of Appeal, affirming the order of Boyd, J., declined to order the production of the Society's books. *The Kent Coal Concessions* v. *Duguid* ([1910] 1 K. B. 904; [1910] A. C. 452) distinguished. *Irish Agricultural Wholesale Society* v. *McCowan* - - - - - App. 313

3.—— *Service out of the jurisdiction—Action of tort—Parties—Co-defendants—G. O. XI, R.* 1 (*h*)—*Principal and agent.*] *W.*, who was resident in England, wrote a number of libels concerning *C.*, who was resident in Ireland, and employed *H.*, a bill-poster, also resident in Ireland, to post, publish, and circulate them in the vicinity of *C.*'s residence. In an action by *C.* against *W.* and *H.* for damages for the libels, *H.*, being served in Ireland, and there being, in the opinion of the Court, no ground for alleging that he was not *bona fide* made a defendant:—*Held*, that a concurrent writ was properly ordered to be served on *W.* in England. *Ross* v. *Eason* ([1911] 2 I. R. 459), and *Sharples* v. *Eason* (ibid., 436, 442), distinguished. *Cooney* v. *Wilson and Henderson* - App. 402

4.——*Service out of the jurisdiction — Public road — Repair — Excessive user of road — Public Roads (Ireland) Act*, 1911 (1 & 2 *Geo.* 5, *c.* 45)—*Action for expenses caused by excessive user—Nature of action—Order XI, R.* 1.] An action brought by a county council or an urban district council under the Public Roads (Ireland) Act, 1911, to recover extraordinary expenses necessary for repairing roads by reason of damage caused by excessive user of the roads from the person liable under the said Act to recoup such expenses, is not within any of the classes of action enumerated in Order XI, R. 1, and consequently where the person sought to be charged in an intended action under the said Act is resident out of the jurisdiction, leave of the Court to issue and serve a writ of summons out of the jurisdiction will not be allowed. So held by Holmes and Cherry, L.JJ., affirming the decision of the King's Bench Division, *diss.* the Lord Chancellor. *Clare County Council* v. *Wilson* - - K.B. 89; App. 96

—— Administration, letters of—Application for, by accounting party—*Ex parte* application—Necessity for *uberrima fides* - 188
See ADMINISTRATION, LETTERS OF.

—— Ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant—Description of defendants in writ of summons—Service 485
See LANDLORD AND TENANT. 2.

—— *Ex parte* application—Necessity for *uberrima fides* - - - - 188
See ADMINISTRATION, LETTERS OF.

—— New trial — Inferences of fact—Power of Court to draw - - - 64, 81
See WARRANTY.

—— New trial—Misdirection—Verdict and judgment against both principal and agent
See PRINCIPAL AND AGENT. [265

—— Question of Law—Interpretation of contract —Disagreement of jury - - 1
See INSURANCE.

—— Time—Enlargement of, to appeal - 250
See PRACTICE. 1.

PRACTICE—*continued.*

—— Warranty — Action for breach of—Form of question left to jury - - 64, 81
See WARRANTY.

PRAECIPE—Tenant to—Common recovery—Seisin - - - - - 281, 290
See ESTATE TAIL.

PRESCRIPTION—Right of way—Holdings under common landlord - - 322
See WAY.

PRINCIPAL AND AGENT—*Joint liability of principal and agent—Purchases on credit—Evidence of authority—Verdict and judgment against both principal and agent—Misdirection.*] *P. O.* purchased a number of sheep from *R.* in a market, and gave a bill for the price of the same; he resided with his mother, *B. O.*, on her farm, and there was some evidence that he was in the habit of buying and selling cattle for her, but there was no evidence that he had on any previous occasion purchased on credit as her agent. The bill was dishonoured on maturity, and *R.* thereupon sued *P. O.* and his mother for the price of the sheep. On the evidence aforesaid the jury found that this particular purchase, which was on credit, was made by *P. O.* on behalf of his mother, *B. O.*, and with her authority; and further, that the parties intended that *P. O.* himself should also be liable, and awarded to the plaintiff the full sum claimed. The jury found a verdict for the plaintiff against both defendants for the said sum, the Judge declining to direct in favour of *B. O.*, though required so to do by her counsel. *Held*, that, on these facts, the verdict entered against *B. O.* should be set aside, and a verdict entered for her. *Rutherford* v. *Ounan* [K. B. 265

—— Agent of general dealer purchasing old metals
See GENERAL DEALER. [205

—— Notice — Non-disclosure to principal of material facts known to agent of other party prior to agency - - 1
See INSURANCE.

—— Co-defendants—Action of tort—Service out of jurisdiction - - - - 402
See PRACTICE. 3.

PRODUCTION AND INSPECTION OF DOCUMENTS—Action of slander
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PROFIT A PRENDRE - - - 119
See TURBARY.

PROHIBITION—Writ of 241, 249, 342, 377
See JUSTICES. 2, 3.
See LABOURERS (IRELAND) ACTS. 1.

PROVISIONAL VALUATION — Publican's licence—Certificate - - 332
See LICENSING ACTS.

PUBLIC HEALTH ACTS—Sewer — Single private drain - - - - 126
See LOCAL GOVERNMENT. 1.

—— Waterworks—Profit made by district council —Income tax - - - - 44
See REVENUE. 2.

PUBLIC ROAD.
See HIGHWAY.

PUBLIC WORSHIP—Building erected and used for—Exemption from rates - 439
See BELFAST LOCAL ACTS. 2.

PUBLICAN'S LICENCE—Certificate—Provisional valuation - - - 332
See LICENSING ACTS.

QUARRY — Road materials taken from, by County Surveyor—Action for value 468
See LOCAL GOVERNMENT. 3.

QUARTER SESSIONS—Right of appeal to—Order of justices to take down dangerous wall—Towns Improvement Acts 35
See JUSTICES. 5.

QUESTION OF LAW—Interpretation of contract—Disagreement of Jury - 1
See INSURANCE.

QUO WARRANTO—Old age pension committee —Invalid election of—No existing office.
See OLD AGE PENSION ACT. [55

RAILWAY COMPANY — *Equal charges — Newspapers carried by passenger trains—Application of section* 90 *of the Railways Clauses Act*, 1845 (8 *Vict. c.* 20) — *Company bound by profession.*] In an action brought under section 90 of the Railways Clauses Act, 1845, complaining of inequality of charge in respect of newspapers carried by defendants by passenger trains from Dublin, as compared with newspapers carried from Belfast, the rate was a flat rate, irrespective of distance, for carriage over the entire of the defendants' railway, and the train times and average length that the respective papers were carried were different. *Held*, that (1) though there was no statutory charge prescribed, and though the defendants were not bound to carry papers by passenger trains, still, as they professed to do so, section 90 applied to preferential treatment in respect of such papers: *Stone's Case* ([1904] 1 K. B. 689) discussed and distinguished. (2) Any cause of action under section 90 was confined to the portion of the line between Dublin and Belfast. (3) The circumstances of the traffic from Dublin and from Belfast were not the same, and the action therefore failed. *Semble*, a flat rate irrespective of distance is not within the section. *Quaere*, whether the mere circumstance that the points of departure were different, necessarily and as a matter of law, would take the case out of the

RAILWAY COMPANY—*continued.*
section. The *Denaby Case* (11 A. C. 97) considered. *Independent Newspapers, Limited* v. *Great Northern Railway Co.* (*Ireland*) [GIBSON, J., 255

—— Lands used as railway—Rate under Towns Improvement (Ir.) Act, 1854 — Conclusiveness of description in final valuation list - - - 142, 171
See LOCAL GOVERNMENT. 2.

RAILWAYS (IRELAND) ACT, 1864 — Extent of incorporation with Labourers (Ireland) Acts - - - - 193
See LABOURERS (IRELAND) ACTS. 2.

RATE—Exemption — General purposes rate — Police rate - - - 439, 450
See BELFAST LOCAL ACTS. 2.

—— Towns Improvement (Ireland) Act, 1854—Lands used as railway—Conclusiveness of description in final valuation list
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RECOVERY DEED—Tenant to the praecipe—Seisin - - - - 281, 290
See ESTATE TAIL.

REDEMPTION OF SUPERIOR INTEREST —Sale under Land Purchase Acts — Purchase-money insufficient to pay redemption-price - - - 210
See LAND PURCHASE (IRELAND) ACTS.

REPRESENTATION—Of soundness—Sale of horse—Form of question left to jury
See WARRANTY. [64, 81

—— Non-disclosure of material fact known to agent of other party before existence of agency - - - - - - 1
See INSURANCE.

REPUTED OWNERSHIP — Bill of sale — Bankruptcy of grantor - - 487
See BANKRUPTCY. 2.

REVENUE—*Income tax—Negotiation fee paid to agent on sale under Land Purchase Acts—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sch. D.—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 23, *sub-s.* 12.] The agent of an estate intended to be sold to the tenants under the provisions of the Irish Land Act, 1903, was employed by the vendors to negotiate the sales, under an agreement by which he was to receive out of the purchase-money a commission of 3 per cent. on the amount of the same, and this agreement was sanctioned by the Estates Commissioners under s. 23, sub-s. 12, of the Act. The estate was sold and the amount of the commission paid to the agent out of the purchase-money. *Held*, that the commission was part of the annual gains and profits of the agent

REVENUE—*continued.*
arising from his vocation as such agent in respect of which he was assessable to income tax. *Humphrey, Appellant*; *Peare, Respondent* [K.B., 462

2.—— *Local authority supplying water—Profit on water rents—Liability to income tax—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35); *Taxes Management Act*, 1881 (43 & 44 *Vict. c.* 19); *Public Health* (*Ireland*) *Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 66, 68.] A local District Council, by virtue of the provisions of the Public Health (Ireland) Act, 1878, provided waterworks for the purpose of supplying water to the inhabitants of their district, and thereby made a profit. *Held*, that such profit was a profit within the meaning of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and therefore liable to income tax. *Mullingar Rural District Council* v. *Rowles* - - - K.B., 44

RIGHT OF WAY—Obstruction—Gate 322
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ROAD.
See HIGHWAY.

ROAD MATERIALS—Taken by County Surveyor—Action for value - - 468
See LOCAL GOVERNMENT. 3.

RULES AND ORDERS—Rules of the Supreme Court (1905)—Order XI, Rule 1 - - - 89, 96, 402
See PRACTICE, 3, 4.

—— —— Order XXXI, Rules, 13–15 - 313
See PRACTICE. 2.

—— —— Order XL, R. 9 - - 64, 81
See WARRANTY.

—— —— Order LVIII, Rule 15 - - 250
See PRACTICE. 1.

—— —— LXIV, Rule 7 - - - - 250
See PRACTICE. 1.

—— Local Government (Adaptation of Irish Enactments) Order, 1899, Schedule (adopting Grand Jury Act, 1836, s. 162) - - - - - - 468
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—— Local Government (Application of Enactments) Order, 1898, Sch. Art. 36 (10) vi, viii - - - - - - 55
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—— Old Age Pension Regulations, 1908, Reg. 21 (3) (*d*) - - - - - 55
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RURAL DISTRICT COUNCIL—Income tax—Waterworks — Profit on water rents - - - - - - 44
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RURAL DISTRICT COUNCIL—*continued.*

—— Land taken for labourer's cottage—Liability to repair fence - - - - 193
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SALE—Warranty—Form of question left to jury
See WARRANTY. [64, 81

SANITARY AUTHORITY—Sewer—Drain
See LOCAL GOVERNMENT. 1. [126

—— Waterworks—Income tax—Profit on water-rents - - - - - - 44
See REVENUE. 2.

SEISIN—Of tenant to the praecipe in common recovery - - - 281, 290
See ESTATE TAIL.

SERVICE—Contract of—Owner and master of ship—Crew - - - - - 385
See WORKMEN'S COMPENSATION ACT, 1906. 2.

—— Default process in County Court—Defendants a limited company—Personal service - - - - - - 474
See COUNTY COURT.

—— Writ of summons in ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant - - - - - - 485
See LANDLORD AND TENANT. 2.

SERVICE OUT OF THE JURISDICTION—Action of tort—Co-defendants—Principal and agent - - - - 402
See PRACTICE. 3.

—— Public road—Excessive user—Action for expenses by County Council—Public Roads (Ireland) Act, 1911 - - 89, 96
See PRACTICE. 4.

SERVIENT TENEMENT — Unreasonable user—Bog—Damage to cut turf 119
See TURBARY.

SEWER—Public Health Acts—Pipe connected with drains of several houses—"Single private drain or sewer" - - - 126
See LOCAL GOVERNMENT. 1.

SHIP—Owner and master—Crew—Contract of service - - - - - - - 385
See WORKMEN'S COMPENSATION ACT, 1906. 2.

SHOPS ACT, 1912—2 *Geo.* 5, *c.* 3, *s.* 1, *sub-s.* 1—*Bank holiday—Christmas Day — Week-day—Two bank holidays in one week—Statute—Construction—Words in singular not read as including plural—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *section* 1, *sub-section* 1 (*b*).] Section 1, sub-sect. 1, of the Shops Act, 1912, enacts that on at least one week-day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon; provided that this provision shall not apply to the week preceding a bank holiday if the shop assistant is not employed on the bank holiday, and if on one week-day in the following week in addition to the bank holiday the employment of the shop assistant ceases not later than half-past one o'clock in the afternoon. *H.* was employed as an assistant in the appellants' shop on each week-day of the week ending Saturday, the 21st December, after half-past one. In the following week he was not employed on Christmas Day or the day following, but was employed on every other week-day of that week after half-past one in the afternoon. The appellants were charged on summons with having failed to comply with section 1 of the Shops Act, by employing *H.* for every day of the week ending 21st December, after the hour of half-past one in the afternoon. *Held*, it being assumed that Christmas Day was a bank holiday within the meaning of the Act, that the expression "bank-holiday," in sub-sect. 1 of section 1, must be read in the singular only; that the expression "week-day" was used in contradistinction to Sunday, and not to holiday; and that therefore the case came within the proviso in sub-sect. 1, and the appellants could not be convicted of the offence charged. *Quaere*, Is Christmas Day a bank holiday within the meaning of the Shops Act, 1912? *Todd, Burns, & Co., Ltd., Appellants*; *Corporation of Dublin, Respondents.* - - - - - K. B. 397

SINGULAR—Words in, not read as including plural - - - - - - 397
See SHOPS ACT, 1912.

SLANDER—Justification—Plea of fair comment—Discovery - - - 313
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SMALL TENEMENT—Ejectment — Summons by one joint owner—Necessity for demand and refusal of possession - - 381
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SPECIAL DAMAGE—Injury to highway—Right of road authority to sue - 250
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STATUTE—Construction—Extent of incorporation of s. 15 of the Railways (Ireland) Act, 1864, in Labourers (Ireland) Acts [193
See LABOURERS (IRELAND) ACTS. 2.

—— Construction — Incorporation, rejecting inconsistent provision - - - 453
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—— Construction—Words in singular not read as including plural - - - 397
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3 & 4 Wm. 4, c. 68, s. 5—Licensing - 332
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6 & 7 Wm. 4, c. 116, s. 162—Grand Jury 468
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10 & 11 Vict. c. 34, s. 75—Towns Improvement
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24 & 25 Vict. c. 70—Locomotives - 250
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27 & 28 Vict. c. 71, s. 15—Railways, Ireland [193
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53 & 54 Vict. c. 59, s. 19—Public Health 126
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TURBARY—*Trespass—Damage by cattle of owner of the soil to turf of owner of turbary rights—Dominant and servient tenement—Unreasonable user of natural rights by owner of servient tenement.*] An action for trespass will lie for damage, caused by the cattle of the owner of the soil and freehold of a bog, to turf, cut and spread on a plot of such bog (not fenced or divided from the residue) by the owner of other lands who enjoys the right to cut and save turf on such plot, where such cattle are depastured by the owner of the soil upon the bog without provision by him for the prevention of such injury by his cattle to the turf. The depasturage of cattle by the owner of the soil of the servient tenement, without such provision against injury to the turf of the dominant tenant so situated, is, under such circumstances, a user by such owner of the soil of his natural rights which is unreasonable in relation to the dominant tenant as prejudicing the value of the incorporeal here-

TURBARY—*continued.*
ditament in the nature of a *profit à prendre* enjoyed by the dominant tenant, by endangering the saving of the turf. *Cronin* v. *Connor* - K. B. 119

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WARRANT—To arrest—Indictable offence—Right of District Inspector to whom warrant is addressed to select justice to hear complaint—Custody of prisoner until warrant executed - - 342
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WARRANTY—*Sale—Horse purchased for stud purposes—Verbal representation by seller of soundness—Form of question left to jury—Inferences of fact—Power of Court to draw—Order XL, Rule* 9.] Plaintiff, requiring a stallion for stud purposes, inspected a horse the property of the defendant, a horse dealer. Plaintiff swore that while he was looking at the horse the defendant said to him, "You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I would tell you." Some days afterwards the price was agreed upon, but as plaintiff was purchasing for a foreign Government department, the sale was not finally completed, and the horse was not delivered for about a month. The horse was afterwards found to be affected by an incurable and hereditary disease of the eyes, which rendered him totally unfit for the stud. In an action brought on an express warranty that the horse was sound and free from hereditary disease, the defendant denied that he spoke the above words or anything to that effect, or gave any warranty. The Judge at the trial in charging the jury said, "The question you have to try is—Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes and was sound?" And, after referring to the conflicting evidence, "There was direct contradiction, which of them do you believe? . . . Did the plaintiff act on that representation in the purchase of the horse?" And he left in writing to the jury (*inter alia*) the question, "Did the defendant at the time of the sale represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes, and did the plaintiff act on that representation in the purchase of the horse?" The jury answered in the affirmative. The defendant's counsel had requested the Judge to leave to the jury the question, Did the defendant warrant the horse sound, or did the defendant represent the horse as sound to his knowledge? The Court of Appeal having directed a new trial on the ground that the question actually left to the jury and their affirmative answer to it did not amount to a finding of an express warranty of soundness, and that the Court could not supply the defect by drawing inferences under Order XL, Rule 9:—*Held*, by the House of Lords, reversing the judgment of the Court of Appeal, that the words deposed to by the plaintiff as having been used by the defendant constituted an express warranty of the soundness of the horse; and that although the word "warrant" or "warranty" did not appear in the question submitted to the jury, that question, especially taken in connection with the Judge's charge, presented for the consideration of the jury all the elements of what constituted a warranty, and that their answer to it in the affirmative, showing that they believed the

WARRANTY—*continued.*

plaintiff's evidence, was a clear finding of an express warranty. *Schawel* v. *Reade.*
[APP. 64 : H L. 81

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WAY—*Right of way—Holdings held under a common landlord—Erection of gate—Presumption of grant—Prescription Act*, 2 & 3 *Wm.* 4, *c.* 71; 21 & 22 *Vict. c.* 42).] The plaintiff and defendant were tenants of holdings held under a common landlord. The defendant had acquired a right of way over the plaintiff's holding. Across the end of this way, where it entered the county road, the plaintiff erected a gate for the convenient use of his holding The defendant was allowed free ingress and egress through the gate. *Held*, no obstruction of the right of way. The law as to the acquisition of a right of way as between tenants of a common landlord considered. *Flynn* v. *Harte* - DODD, J., 322

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WORKMEN'S COMPENSATION ACT, 1906—*Accident arising "out of and in the course of" the employment—Compensation—Sleeping apartment—Dangerous state of roof—6 Edw.* 7, *c.* 60, *section* 1 (1).] A domestic servant, employed in a private hotel, was called by her mistress at 6 o'clock in the morning to light the fire in the kitchen range. While in the act of getting up to do so, some mortar from the rendering attached to the slates fell into her right eye, in consequence of which she lost the sight of that eye. Handfuls of mortar had often before fallen from the slates above the servant's sleeping-room to the knowledge of her employer. *Held*, that the accident arose out of and in the course of the employment. *Aldridge* v. *Merry.*
[APP. 308

2.——*Contract of service—Owner and master of ship—Crew—*6 *Edw.* 7, *c.* 60, *s.* 13.] The owners of a small coasting schooner, by written agreement, gave command thereof to *K.* on the following conditions: *K.* was to work the vessel on the best paying trade for the benefit of all concerned, receiving for his services two-thirds of all freights carried, out of which he was to pay all crews' wages, victuals of crew, port-charges, towages, and all other expenses connected with working the vessel; the remaining one-third *K.* thereby agreed to remit to the owners as "owners' share." If *K.* had cause to give up command, and so advised the owner, and if requested, *K.* was to bring the vessel to *A.* free of charge. While *K.* was working the vessel under this agreement one of the crew whom he had engaged met with an accident, for which he claimed compensation against the owners under the Workmen's Compensation Act, 1906. *Held*, that, on the true construction of the agreement, *K.* was acting merely as agent for the owners in hiring the crew, and that the relation of master and servant, within the meaning of the Act, existed between the applicant and the owners. *Kelly* v. *Owners of Ship "Miss Evans"* APP. 385

3.—— *Incapacity, at first total, and then partial—Reduction in weekly payments—Evidence—Jurisdiction of County Court Judge—*6 *Edw.* 7, *c.* 60, *Schedule I* (3).] A workman, at first totally incapacitated by an accident for the consequences of which the employers accepted liability, was paid by them half wages for some months, when they sought to reduce the weekly rate of payment on the ground that total incapacity had ceased. The workman applied for arbitration, and was the only witness examined before the County Court Judge. He proved that he had tried to get employment, and failed; and was admittedly not actually in any employment at the time of his application. He did not, however, give any estimate of what would be the value of his services if employed. No evidence of any kind was adduced by the employers. The County Court Judge awarded the applicant, until further order, a weekly sum which

WORKMEN'S COMPENSATION ACT, 1906 —*continued.*

was equivalent to half the wages he was earning up to the time of the accident. *Held*, that the County Court Judge was within his jurisdiction in making the award, and that it should be affirmed. *Osborne* v. *Tralee and Dingle Railway Company* [APP. 133

WRIT OF SUMMONS—Ejectment for non-payment of rent—Vacant possession—No personal representative of deceased tenant — Description of defendants — Service - - - - - 485
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